A New Way of Life Re-Entry Project

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Testimony of CT Turney, Senior Staff Attorney
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Thank you for giving me the opportunity to speak with you today regarding an issue that impacts so many of my clients.

My name is CT Turney, and I am Senior Staff Attorney at A New Way of Life Reentry Project. A New Way of Life is a non-profit organization located in Watts in South Los Angeles, with a mission to advance multi-dimensional solutions to the effects of incarceration. As part of our services, A New Way of Life offers free legal representation to formerly incarcerated and convicted people in a variety of matters, including in applications for occupational licenses.

For the past nine years, A New Way of Life has represented clients in their efforts to obtain a wide variety of occupational licenses and license-related clearances, including criminal record clearances for employment in state-license care facilities, real estate and insurance agents, nursing, security "guard cards," and federal transportation worker credentials, among others. I greatly appreciate this opportunity to share some of the insights we have gained over these years.

The issue of occupational licensing is increasingly important to formerly incarcerated people, for several reasons. As the Commission itself has recognized, more and more careers now require licensure. Additionally, many careers that require licensing offer more stable jobs, dependable income, and the potential for income growth than other types of employment often available to people with past convictions. Although I do not have precise numbers, many of my clients seek careers in health care, caretaking, real estate, insurance, contracting, and other areas, precisely because of those benefits. Without licensing, the options available to these same clients are often warehouse work, retail, restaurant staffing, and low-level clerical work.

Licensing also offers greater potential for entrepreneurship in many professions. As people with conviction histories find it difficult to secure work for a traditional employer, many seek to start their own businesses, which often require industry-specific licensing, as well as general business licenses. Without entrepreneurial opportunities, many of my clients would be unable to establish meaningful careers.

The ability for people with past convictions to find work and support themselves and their families clearly has a direct benefit for that potential licensee. However, it also has benefits

for their communities. Gainful employment is a significant factor in reducing recidivism. Additionally, people who are able to find meaningful work place less burden on social support networks, contribute to the economy with purchases and taxes, and become a more stable part of the fabric of their communities. As the need for licensing continues to increase, the issue of licensing becomes a more and more significant factor in all of these outcomes.

If the premise of licensure is that some types of work require increased regulation for the protection of the public, then it stands to reason that restrictions on licensing based on past convictions should be tailored to only disqualify those applicants who would currently pose a meaningful threat to the public if they held the license in question. In other words, if the person does not pose a meaningful threat to the public *at present*, they should not be denied the license. Similarly, if the person poses no greater threat to the public with the license than without it—in other words, the past convictions bear no relation to the function of the license—they should similarly not be denied the license.

Unfortunately, for various reasons, restrictions on licensure generally far exceed this aim. More often, people with past convictions are denied licenses out of a generalized fear of people with past convictions. Rather than any present, tangible threat, license restrictions often rise from a more knee-jerk reaction that we want people who have "done that" to be as far away from us as possible.

When policies and decisions are made based on visceral fear rather than on a reasoned analysis of actual risk, they reach far beyond the justification of public safety. Instead they merely serve as additional punishment for a past offense. In the process, such policies impose greater burdens on individuals, who lose out on stable work and better pay, and on communities, who lose out on financially stable members as well as the services of otherwise qualified professionals.

In this testimony, my goal is to provide you with an overview of the main issues I have seen in my practice related to securing licensing for people with past convictions. Where possible, I offer possible solutions as starting points for thinking about ways some of these problems might be remedied or avoided.

A GENERAL OVERVIEW OF LICENSING STATUTES AND REGULATIONS RELATED TO PAST CONVICTIONS

As an initial matter, it is helpful to provide some background of the statutes and regulations that govern the issuing of licenses in relation to applicants with past convictions. The first thing to understand is that there are as many different guidelines as there are licenses. Each license has its own criteria for what constitutes grounds to deny a license, and what procedure is used to do so. It would be impossible to cover them all; however there are several common regulatory schemes that it is helpful to understand.

A large number of licenses in California are issued under the Department of Consumer Affairs (DCA), and have governing statutes in the California Business & Professions Code. Regarding the use of convictions, all of these licenses are governed in a general manner by Business & Professions Code sections 480 and 490, which provide that a license may be denied or revoked only on the basis of an offense that "is substantially related to the qualifications, functions, or duties of the business or profession for which application is made." Section 481

requires that each board develop criteria to determine what offenses are "substantially related" to the license at issue. Section 480 further states that an application cannot be denied if the applicant meets criteria of rehabilitation established by the governing agency; section 482 in turn requires that agencies develop criteria for rehabilitation.

Under this scheme, in addition to the general provisions of sections 480, 481, 482 and 490, individual licenses have more specific statutory restrictions, found throughout the Business and Professions Code. One step further, still more specific criteria for "substantial relationship" and rehabilitation for each license are contained in Title 16 of the California Code of Regulations.

With this framework, on the surface it appears that for licenses governed by the DCA, applicants can only be denied for convictions related to the license, and even then, not if they can establish rehabilitation. This appears to be a common-sense approach, and while it may be the start of one, it often fails to result in common sense, levelheaded results, for reasons I will discuss throughout this testimony.

While this regulatory framework governs many licenses in California, there are also licenses that are governed wholly outside the Business & Professions Code. These include, among other things, teaching and education-related credentials, insurance licensing, certified nursing assistants and home health aides, and more. For these licenses, there is often an enumeration of the offenses that will bar an applicant, and a discussion of mitigating factors that may be considered by the relevant agency. In general, however, there often is less of a statutory mandate that convictions be reasonably related to the functions of the license, and less explicit requirement that an agency thoroughly consider evidence of rehabilitation.

Underneath the statutory and regulatory frameworks discussed for these licenses, some agencies also have adopted internal policies and guidelines to provide more detailed direction to agency employees in evaluating applications. These guidelines can often be acquired through Public Records Act requests, but may or may not available through means such as the agency's website, and their existence may or may not be readily publicized.

A third regulatory framework that I will discuss does not involve the specific licensing of the individual. I include it here because it involves the employment of individuals at state-licensed facilities, and because it is an area that impacts an incredible number of my clients. This third area involves employment at facilities licensed by the California Department of Social Services and the Department of Developmental Services, for providing care for children, elderly, and developmentally disabled adults. These facilities range from home daycare programs to 24-hour residential care facilities, and include foster homes, family caretaking, and the provision of care services such as cooking and cleaning in a client's own home. Such work is immensely important to people in communities that I serve.

Under the DSS and DDS framework, an individual can be denied clearance to work in a licensed facility for any conviction other than a minor traffic violation, regardless of the age or severity of offense. Once clearance has been denied, the individual must request a criminal record exemption to be allowed in the facility. In order to be granted a criminal record exemption, the applicant must establish rehabilitation as well as provide substantial and convincing evidence of their current good character.

When analyzing the requirements of any individual license, it is always important to keep in mind what regulatory framework the license falls under. These various frameworks have significant impacts on who has the burden of proof, and what they must establish in order to deny or secure a license.

Having given this overview, I will now discuss some of the most prevalent issues I have seen in my licensing representation work.

ISSUE #1: BROAD AND VAGUE STANDARDS GOVERNING LICENSING DENIALS ON THE BASIS OF CONVICTIONS

As discussed above, statutes or regulations provide the authority for an agency to deny a license on the basis of a conviction. For most licensing structures, those convictions that can be used are ostensibly limited to those offenses that have a reasonable relationship to the license being sought. In many cases, however, the link between the offense and the license stretches credibility. In other cases, the language in the statute or regulation is so vague as to be practically meaningless.

One of the most striking examples that I have encountered is the licensure of insurance agents and brokers. It is notable that insurance licenses do not fall under the Department of Consumer Affairs, and so are not subject to the provisions of Business & Professions Code sections 480, which explicitly limits the use of convictions to those that are "substantially related." A license to sell insurance can be denied based on a conviction for any felony.[1] There is no requirement that the offense be related in any way to the actual practice of insurance—the fact that it was a felony is considered enough to establish an applicant's unsuitability for licensure. Further, the Insurance Commissioner may deny the license without offering a hearing or any avenue of appeal to the applicant.[2]

This broad sweep extends to many misdemeanors as well. Among other things, applicants can be denied an insurance license on the basis of a misdemeanor conviction for any form of theft, obstructing a police officer, any offense involving willful injury to property, and "multiple convictions which demonstrate a pattern of repeated and willful disregard for the law."[3] Under these guidelines, someone can be denied an insurance agent license for shoplifting, arguing with a police officer, tagging a bus bench, or even for repeatedly driving with a suspended driver's license.

It is true that the commissioner does have the leeway to grant a license notwithstanding such convictions, and very well might do so in the case of such simplistic offenses as those examples. However under current law, such leeway is at the discretion of the Commissioner; the Commissioner is under little obligation to exercise it.

Even broader is the language in statutes and regulations that govern employees at care facilities licensed by the Department of Social Services. As noted above, an individual can be barred from working or volunteering at such a facility for any offense other than a minor traffic

[1] Cal. Ins. Code § 1668(m)(1); 10 CCR 2183.2(a)
[2] Cal. Ins. Code § 1669
[3] 10 CCR 2183.2(b)

violation.[4] Individuals can also be barred for any "conduct that is inimical to the health, morals, welfare, or safety" of the people of the State of California.[5] Under this language, literally any conviction can be used as the basis for barring employment.

When standards are not explicitly broad, difficulties still arise when they are overly vague. Even when agencies are required to determine what offenses are substantially related to the license, the statutes and regulations that do so are far from precise. Many include a generalized statement that "substantially related" convictions are any convictions that "evidence a potential unfitness" to have the license. Regulations often include a list of specific types of offenses, but with the caveat that disqualifying offenses are not limited to those listed, and even these more specific lists often contain a generalized catch-all provision.

For example, the Contractor's State License Board regulations state that a conviction is substantially related if it "evidences a present or potential unfitness . . . to perform the functions authorized by the license in a manner consistent with the public health, safety, and welfare."[6] The regulation then lists specific categories of offenses, and then concludes with "crimes or acts that indicate a substantial or repeated disregard for the health, safety, or welfare of the public." Such general language provides little or no realistic guidance as to what offenses may actually be used to deny licensure.

Problems also arise with standards used to gauge an applicant's rehabilitation. Such standards are intended to place the focus squarely on the present risk—or lack of risk—that the applicant poses. Unfortunately, many of these standards are riddled with vagueness as well. For example, the criteria for rehabilitation for a Registered Nursing license are:

1. The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.
2. Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the code.
3. The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).
4. The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.
5. Evidence, if any, of rehabilitation submitted by the applicant.[7]

Similarly, the criteria for how heavily to weigh the importance of a past conviction for an insurance broker or agent license are:

a. The extent to which the particular act or omission has adversely affected other person(s) or victim(s), including but not limited to, insurers, clients, employers or other persons, and the probability such adverse effects will continue;
b. The recency or remoteness in time of the act, misconduct, or omission;

[4] Cal. Health & Safety Code § 1522
[5] Cal. Health & Safety Code § 1558
[6] 16 CCR 868
[7] 16 CCR 1445(a)

c. The type of license applied for or held by the licensee or applicant involved;
d. The extenuating or aggravating circumstances surrounding the act, misconduct, or omission;
e. Whether the licensee or applicant has a history of prior license discipline, particularly where the prior discipline is for the same or similar type of conduct.[8]

These guidelines provide virtually no guidance as to what is "enough" rehabilitation or mitigating evidence in order to receive the license. An applicant must guess, for instance, whether five years since they shoplifted is long enough, or if they should wait ten.

Problems Arising from Broad and Vague Standards

Vague and overbroad standards lead to considerable problems for applicants in several ways. Not only do they result in excessive license denials, they create uncertainty and confusion for those contemplating pursuing a particular license.

Excessive License Denials

First and foremost, overbroad and vague standards result in people being denied licenses for offenses that in no way relate to specific risks of a certain license, and in cases where the person has long since ceased to pose any real risk. Obviously, this result is clearest with those standards that are explicitly broad. Perhaps less obvious is that vague standards have much the same impact as explicitly broad ones.

In my experience, many licensing boards use imprecise standards to expand the offenses for which they will deny a license. The less well defined the standards are, the more latitude an agency can claim in denying an application. As discussed elsewhere, in my experience applicants are at a substantial disadvantage in sophistication and resources, and without legal representation rarely have the ability to mount a serious challenge to the denial of a license. Vague standards magnify this disadvantage by providing plausible coverage for denials that, if challenged in court, may not be upheld.

Difficulty in Gauging Likelihood of Success

Additionally, vague standards make it difficult for applicants to determine whether to pursue a certain license, because they cannot accurately gauge the likelihood of being successful. This uncertainty has ramifications far beyond simply deciding whether to apply or not, as potential applicants must also decide whether to undertake training and preparation. Preparation for many licenses requires significant costs in both money and time. For example, Registered Nursing programs span 2-4 years; applicants are essentially required to commit to the equivalent of a college education, without knowing whether they can ultimately obtain a license.

This uncertainty is a two-edged sword. On one side, some people who have truly disqualifying convictions optimistically pursue training to no avail; they may spend years on training that they cannot use, and incur debt without the expected career to repay it. On the other side, many people who would be successful applicants choose not to take the risk. This deprives

[8] 10 CCR 2183.3

applicants of a lucrative profession, and deprives their communities of valuable service providers. Even further, many training programs vigorously screen out applicants with past convictions, even if those applicants would realistically be successful in obtaining a license. Although I do not have research on this area, in my experience it appears that training programs fear that accepting such students will negatively impact the success rates of their programs.

Potential Solutions

Narrow and Specific Tailoring of Disqualifying Offenses

There are multiple ways that standards can be tailored to provide meaningful guidelines both to agencies and to applicants. First and foremost is to clearly delineate those convictions that relate in a meaningful way to the license being issued. In other words, the only disqualifying convictions should be those that point to an increased risk to the public that specifically stems from the functions of the license.

Consider offenses that contain an element of violence, such as battery or domestic violence. There is a common knee-jerk reaction that giving a license to someone with a violent offense on their record, even a misdemeanor, would be endangering the public. The question should not, however, be whether the public is placed in *any* danger by interacting with this person, but whether the public is placed in *more* danger because the person has the license being sought.

For example, in the context of a security "guard card," there is a stronger argument that someone with a recent history of violence may be more likely to pose a greater threat to the public. The functions of a security guard have an inherently greater likelihood of a heated interaction or physical altercation simply by the nature of the work. In the context of an insurance license, however, it is difficult to see how the public is at a greater risk than it would be if the person had any other occupation, such as a store clerk or sales representative.

For some licenses, such analysis might preclude the denial of a license for practically any criminal conviction. This is not necessarily a bad thing. Consider, for example, licenses for barbering. The primary goal of licensing barbers is to ensure that proper sanitation and health practices are followed, to protect the health of employees and customers. Beyond sanitation and health, however, there is little room to claim that the public is at greater risk from a barber with a history of violence or theft, than they would be from any other retail employee with such a background. At first glance, the restrictions established for a barbering license reflect this limited risk; the only offenses enumerated are violations of specific laws governing barbering, and offenses committed in association with use of a barbering license.[9] A closer reading, however, shows the same catch-all standard as other licenses: offenses that "evidence[] present or potential unfitness of the licensee to perform the functions authorized by the licensee in a manner consistent with the public health, safety or welfare."[10]

This example illustrates that it is not enough to merely theoretically tailor disqualifying convictions to those related to the license. The above-mentioned barbering regulation, like so many others, already theoretically narrowly tailors convictions. However the vague language used in the regulation defeats this intended tailoring, providing significant room for on-the-

[9] 16 CCR 970
[10] *Ibid.*

ground expansion of those offenses that can be used to justify denial of a license. Because of this, regulations should specifically enumerate those categories of offenses that may be used to deny a license.

A useful example of such narrow tailoring is the federal regulation that governs issuance of credentials to airport workers. This regulation, contained in Title 49, Section 1542.209(d) of the Code of Federal Regulations, provides a specific list of those offenses that will prevent an applicant from receiving the credential.[11] This list is reasonably well tailored to the specific risks involved in possessing the credential, which allows workers to access secure airport areas. It is easy to parse, and a potential applicant can easily determine whether they will have difficulty securing the credential.

Concrete Rehabilitation Guidelines Involving Time Periods and Post-Conviction Relief

Regulations should also provide more meaningful guidelines regarding evidence of rehabilitation. While the notion of rehabilitation is by nature somewhat difficult to quantify, and will necessarily contain some "soft" guidelines, the passage of time and the granting of post-conviction relief by criminal courts are concrete measures that can be clearly addressed in regulations.

While almost every licensing regulation I have seen accounts for the passage of time in some way, most do so with only a general reference to the passage of time, such as the examples provided earlier: "the recency or remoteness in time,"[12] or "the time that has elapsed since commission" of the offense.[13] There are, however, many examples of agencies using the passage of time as one gauge for rehabilitation, in a concrete and useful way.

The federal regulation of airport workers, referenced above, is one example. Under this regulation, disqualifying convictions are only at issue if the conviction occurred within the past 10 years.[14] Regulations governing the federal TWIC (Transportation Worker Identification Credential), used for maritime and land transportation workers, also utilize clear time-based restrictions. Under these regulations, some particularly serious offenses may permanently disqualify an applicant, while others will only disqualify an applicant for seven years following conviction, or five years following release from incarceration.[15]

At the state level, the regulations of the Contractors' State License Board incorporate clearer time-based guidelines to a greater degree than many others. Under its regulations, the Board has established baseline times for rehabilitation of seven years for felonies, and three years for misdemeanors.[16]

There is a strong argument that creating inflexible time-based parameters may unduly harm both applicants and licensing boards, by removing an agency's ability to consider granting or denying a license in particularly unique or compelling situations. Such time-based parameters, however, can still provide some leeway for unique considerations. Regulations for

[11] 49 CFR 1542.209(d)
[12] 10 CCR 2183.3, pertaining to insurance agent licenses
[13] 16 CCR 1445(a), pertaining to registered nursing licenses
[14] 49 CFR 1542.209(d)
[15] 49 CFR 1572.103
[16] 16 CCR 869(a)(1)

both the TWIC and contractor's licensure provide such options. TWIC regulations allow for a waiver to be granted even in the case of some permanently disqualifying convictions,[17] while contractor regulations allow for the baseline time to be adjusted either up or down.[18] Although this allowance reintroduces some element of uncertainty, having the clear baseline provides a better point of reference for potential applicants, and also establishes standards that must be met in order to deviate from the baseline.

Guidelines should also more concretely consider the impact that certain types of post-conviction relief have on consideration of a conviction. Certificates of rehabilitation, for example, require an intensive review of the applicant's character and history by the court and district attorney.[19] This review includes references, residence, work history, and a requirement that the applicant be free from negative contact with law enforcement for seven to ten years. Such an investigation and judicial assessment of rehabilitation should be given meaningful weight in licensing. Similarly, the early termination of probation under Penal Code section 1203.3 requires a finding by the court that relief from probation is warranted by the applicant's good conduct and reform.[20] Set aside and dismissal remedies, provided under Penal Code sections 1203.4, 1203.4a, and 1203.41, also often involve a judicial finding that relief is warranted by the interests of justice.[21]

ISSUE #2: DENYING LICENSES ON THE BASIS OF APPLICATION DISCLOSURES

The second significant problem I have seen for people with past convictions is the denial of licenses based on an alleged failure to honestly and forthrightly disclose their convictions and the circumstances of their convictions during the application process. One interesting point of note from my practice is that with only one exception, every client I have represented who was ultimately unsuccessful, failed because of alleged dishonesty in their application materials.

Virtually every licensing scheme includes a provision that allows for an applicant to be denied if they "knowingly made a false statement of fact that is required to be revealed in the application for the license."[22] This is the language applicable to all licenses issued under the Department of Consumer Affairs; similar language exists in every license that I have researched, including authorizations for employment at care facilities licensed by the Departments of Social and Developmental Services.

As a matter of course, applications almost always ask whether the applicant has ever been convicted, and if so, often require that the applicant to provide information about the convictions. The requested information generally includes a statement by the applicant explaining the convictions, official documents about each offense, and occasionally evidence of rehabilitation. Providing incorrect information in this area usually constitutes a separate and independent basis for denying licenses, and is also often used as conclusive evidence that the applicant has not been rehabilitated.

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[17] 49 CFR 1515.7
[18] 16 CCR 869(a)(2)
[19] Cal. Pen. Code §§ 4852.05, 4852.12(a)
[20] Cal. Pen. Code § 1203.3(a)
[21] Cal. Pen. Code §§ 1203.4(a) & (c), 1203.4a(b), 1203.41(a)
[22] Cal. Bus. & Prof. Code § 480(d)

This issue comes into play even when an applicant has been convicted of an offense that would otherwise not be an issue for receiving the license, but fails to accurately or adequately provide information about the conviction. Even though the underlying offense would not have disqualified the applicant, and they therefore had no reason to be untruthful, the purported dishonesty now becomes grounds for denying the license.

The commonly understood narrative of rehabilitation holds that if someone is rehabilitated, and therefore trustworthy, they will be up front and honest about past convictions. Under this logic, if a person fails to disclose a conviction, or does not provide a truthful explanation of what occurred, they should be deemed to be untrustworthy and denied a license on those grounds. This conception, however, overlooks the reality of what people with convictions may experience, remember, or believe about what convictions must be disclosed.

Applicants often do not remember the details of their convictions or may misremember them. This is particularly true for people with extensive conviction histories, old convictions, or convictions that occurred in the midst of addiction or mental health issues. In some cases, memory simply fails. In others, details from one conviction to another blend together, leaving the applicant uncertain. In many cases, applicants never really understood what they were convicted of—the criminal system is not particularly user friendly. It is not uncommon for me to meet with clients who have recent convictions, who thought they had been charged with one thing, but actually pled to something totally different.

Having access to records does not always help clear up the situation. RAP sheets from the Department of Justice (DOJ) are notoriously difficult for people to read, with a single offense appearing multiple times, poor delineation between records for different offenses, and confusing distinctions between what a person was arrested for, what they were charged with, and what they were actually convicted of, and when all of these events happened.

Applicants may also mistakenly believe that certain records do not need to be disclosed. I have met with many clients who incorrectly believed that a conviction "fell off" your record after a certain length of time. For applicants with minor offenses where they were not taken into custody by police, they may not realize that they have a criminal conviction at all. This is often the case with "tickets" for disturbing the peace, public drunkenness, shoplifting, and driving without a license.

Further confusion arises once a person has received post-conviction relief for a conviction, such as set aside and dismissal under Penal Code section 1203.4. On one hand, the statutory language of 1203.4 specifically states that a conviction dismissed under 1203.4 must still be disclosed on an application for licensure; and licensing applications often specify that a conviction must be disclosed even if it has been dismissed under this provision. On the other hand, often clients do not make the connection between language about section 1203.4 and the "expungement" they received. Applicants often understand their conviction as simply being "expunged," and language about "dismissals under 1203.4" means nothing to them. They do not realize that the two are one and the same.

If an applicant makes an error in their disclosure, it is possible to show that the error was inadvertent, rather than intentional. Once the applicant is in that position, however, they are already at a disadvantage, and agencies may be skeptical that mistakes were inadvertent. It may seem incredible to an agency representative that somebody could not know what they were convicted of, cannot clearly remember the events that led to particular conviction, or do not

remember what sentence they were ordered to serve. In my experience, however, such things are the norm rather than the exception.

Potential Solution: Request Information After Providing Applicant with Clear Background Check Results

The easiest way to remedy this situation is to simply not rely on the faulty memories of applicants looking at confusing official records. Nearly every application requests information about convictions at the initial stage of the application. There is no reason, however, why this cannot be held until later in the process. Agencies do not actually rely on the applicant's answers to determine whether the applicant has any convictions; they obtain fingerprint-based background checks from the Department of Justice that tell them whether the applicant has ever been convicted and of what. The only remaining purpose for asking for this information at the beginning would seem to be as a test of candor. As just discussed, however, this is often an unreliable test.

A more logical approach is for the agency to obtain the DOJ results, and if there are one or more convictions that pose an issue for the license, request information about those specific convictions. In making the request, agencies should provide results to the applicant that are clear and readable, and that specifically indicate which convictions the applicant must provide information about.

This approach still provides the agency with the means to get the information that is actually needed: what happened in the offense and how it might relate to the license, as well as the opportunity to gauge the applicant's rehabilitation through seeing how they describe and relate to the pertinent conviction. Denials based on faulty memory or misunderstanding of the law would be greatly reduced, as would denials based on misinformation about otherwise entirely irrelevant convictions.

ISSUE #3: UNSOPHISTICATED AND UNPREPARED APPLICANTS

The third issue that I see prevalently in my practice is applicants that are unsophisticated in presenting evidence to the agency, or unprepared to adequately assert their rights and defend their application. This issue may be the most stark when an application procedure reaches the point of an administrative hearing, but often exists throughout the application process.

In preparing an initial application, clients routinely fail to realize the extent of documentation and evidence that is needed to successfully apply for a license. This is particularly true with evidence of rehabilitation. In many cases, although evidence of rehabilitation is an important factor in determining whether a license will be granted, it is barely mentioned in the list of documents and information requested by the agency.

The request for information sent to applicants seeking clearance to work in a DSS-licensed care facility is illustrative of this problem. Under statute and DSS regulations, an applicant with a prior conviction must provide "substantial and convincing evidence" that they have "been rehabilitated and [are] presently of such good character as to justify" the clearance.[23] Under this statutory structure, information about rehabilitation is not merely helpful; it is

[23] 22 CCR 80019.1(c)(4)

required. However, the request for information to apply for clearance makes only vague reference to information about rehabilitation. Specifically, the form letter sent by DSS requests the following:

1. A signed statement describing the events of the conviction;
2. Documentation about probation;
3. Verification of "any training, classes, courses, treatment or counseling;"
4. Three character reference statements, which must be provided on forms created by DSS and which don't ask the referrer to discuss rehabilitation or character in specific relation to the applicant's conviction; and
5. Police reports related to the offense.

Unsurprisingly, clients who apply for clearance before seeking legal assistance almost always fail to provide any meaningful evidence of rehabilitation in their application. At best, they predictably go down what they perceive to be a checklist of everything DSS is asking for. They are then surprised when their application is denied, and surprised again when I begin instructing them to round up meaningful letters of recommendation, awards and certificates, school transcripts, employment records, and write a letter of explanation that goes in depth into the ways they now live as a law-abiding member of their community.

Even when applications are more comprehensive in asking for evidence of rehabilitation, applicants are often shortsighted about what may constitute such evidence. Many people think of "rehabilitation" as formal programs or classes. They do not realize that things they take for granted, such as attending church, caring for a family member, or even just maintaining stable employment, all constitute evidence of their rehabilitation.

Some applicants also simply do not realize the extent of effort and evidence that is required to assert their rights. Many approach completing an application as "just filling out a form," and have difficulty realizing that what they thought would just be a one-page form is actually an extensive exercise in rounding up documents and evidence. This is particularly true if the applicant's convictions are old or seem to be very unrelated to the purpose of the license. In the applicant's mind, it seems like a common sense matter that the conviction should have little to do with applying for the license, and they fail to realize the importance of providing thorough information.

All of these issues are exacerbated if the process progresses to an appeal or a formal hearing. In addition to not understanding what was needed in the initial application, applicants now venture into more formal legal proceedings without an understanding of specific legal standards, concepts of burdens of proof, and even the form that the appeal will take. My clients are regularly surprised to learn that an appeal will be a very formal hearing involving a judge, an opposing lawyer, evidence, and sworn testimony. They often presumed that the hearing would simply be an opportunity to talk to a representative of the agency and explain the situation.

The end result of all of these factors is that many people are ultimately denied licenses not because they truly pose a threat to public safety, but because they simply were not effective in presenting their case. Such a result hurts communities and agencies that lose out on qualified licensed professionals, and obviously also hurts applicants that needlessly miss opportunities for more stable and better paying work.

Potential Solutions

Agencies Adopting a Cooperative Approach to Obtaining Information

The easiest way to mitigate this issue is for agencies to adopt a more proactive and cooperative approach in gathering the information needed to make a determination about an application. In my experience, agencies typically have a front-line staff of analysts who evaluate applicants with convictions, making an initial recommendation for granting or denying the application. Such analysts are in a prime position to interact with applicants, recognize when an application is lacking important elements, talk to the applicant about what is missing, and help guide the applicant towards providing documentation that truly reflects the applicant's level of risk or rehabilitation.

Anecdotally, the California Department of Public Health, which controls issuance of Certified Nursing Assistant and Home Health Aide certificates, takes this approach. Several clients have related to me that analysts for this agency took a more proactive approach in requesting specific documentation, and helping to guide the applicant in providing complete materials.

Analysts can even use this method to get information for an application directly from the person seeking licensure. If the goal is to gauge the actual risk that an applicant presents, the best way to do this may not be through formal written statements, but through conversation and direct communication.

Increased Utilization of Informal Hearings

If an initial application is denied, a better option than moving directly to a formal hearing may be to increase the use of informal hearings. Informal hearings provide the opportunity for what many of my clients expect would happen: for the applicant and agency to talk about the situation and get a better understanding. Informal hearings are by nature less contentious, and more directed towards a candid attempt to understand the applicant's current situation and character.

I have found that the Bureau of Security and Investigative Services utilizes the informal hearing process with some success. If an applicant is initially denied a license from BSIS, they have the option to move directly to a formal administrative hearing, or instead to attend an informal hearing, where they meet directly with representatives from the bureau and discuss the issue at hand. In my experience, such candid and direct communication is often more effective than a contentious legal proceeding.

Support for Pro Bono Legal Representation Programs

Inevitably, there will be some cases for which formal hearings are necessary, and it is in these situations that people with past convictions are most at a disadvantage. People with convictions who are seeking a license are rarely in a position to afford legal counsel. Without representation, applicants have little chance of successfully navigating the formal hearing process.

Unfortunately, programs that provide pro bono legal representation for people seeking licensure are few and far between. Increased public support for programs to expand access to

legal representation would go a long way towards ensuring that these formal hearings are held on even footing.

ISSUE #4: FAILURE TO MEANINGFULLY APPLY LEGAL STANDARDS EARLY IN THE ANALYSIS

The final issue I would like to address is that in my experience, the initial analysts who review license applications often fail to meaningfully apply the correct legal standards when determining whether to recommend grant or denial of an application. For many agencies, it appears to me that it is not until a license denial is appealed that trained legal staff review the application with a serious evaluation of burdens of proof, weight of the evidence, and proper legal standards.

The end result of this is naturally that more applications will be denied, with the onus placed on applicants to appeal the denial. Agency employees have significant incentives to be risk-averse in recommending granting or denying a license. The envisioned consequence of granting a license is that the applicant will go on to misuse the license or cause some harm. Even if the odds of this happening are relatively small, rhetoric of public safety often hinges on the notion that no risk is too small, and that one incident is one too many. On the flip side, the consequences for improperly denying a license are small. At worst, the applicant will appeal and the decision will be reversed. Often, though, the denial is the end of the line, as applicants lack the resources to mount a meaningful appeal.

Potential Solution: Increase Training and Support for Analysts

As I am not privy to the internal practices and training of most licensing agencies, my ability to offer concrete suggestions for improvement is limited. One potential for improvement in this area may simply be to provide improved training for front-line analysts, and to reinforce this training. This approach alone, however, may not do much to alleviate the pressures analysts feel to lean towards denial of an application.

Analysts could be provided support in other ways. One approach that I have seen used to good effect in the employment context is for agencies to adopt a team-based approach to granting or denying a license. In the employment context, best practices under the Equal Employment Opportunity Commission involve giving each applicant an individualized review of the nature of the convictions, the nature of the job being applied for, and evidence of mitigation and rehabilitation. In other words, it calls for an analysis strikingly similar to that envisioned by Business and Professions Code section 480. Often employers perform this "analysis" in a perfunctory manner, with one person making a quick decision one way or the other, with results that do not greatly increase the odds for someone with a past conviction.

At least one major corporation, however, has successfully implemented a more comprehensive approach. Under this approach, there is a team of staff members who review an applicant's file, convictions, and potential job duties, and determine whether or not these factors considered together should result in the denial of employment. The result is a much more thoughtful consideration, and has led to a significant drop in the number of applicants denied employment on the basis of convictions.

In the agency context, such a team approach could be used for considering many applications. Ideally, an agency could designate certain convictions as posing no barrier to licensure, and time-based guidelines after which even a potentially related offense would not be considered; for these cases, an analyst is free to approve the application with no issues. For those applications that have convictions deemed to be more related and more recent, the application could move to a team-based review. In this way, the decision can be made by an analyst who has had more direct contact with the applicant, in close conjunction with a more experienced supervisor, and a legal staff member who can provide analysis using the actual legal standards that should apply.

CONCLUSION

In closing my testimony, I note that one overarching theme that seems evident in my suggestions is the adoption of less oppositional processes on the part of agencies, and focusing on the best way to reach the desired goal of protecting the public without placing onerous burdens on people with past convictions. In many of the cases that I represent, the process has long since moved away from common sense notions of whether a particular person actually poses a realistic threat to public safety and welfare. Policies, laws and regulations that focus more on a collaborative effort to make a reasonable assessment of risk, rather than on automatically presuming a combative stance, could go a long way towards achieving this tricky but important balance.

Thank you again for your time and consideration.

Sincerely,
CT Turney