

A Systemic Performance Audit of the

# Department of Commerce

An Examination of Professional  
Licensing, Real Estate, and Securities

Office of the Legislative  
Auditor General

Report to the UTAH LEGISLATURE





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Senator Evan J. Vickers | Representative Mike Schultz

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November 14, 2023

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report:

“A Systemic Performance Audit of the Department of Commerce: An Examination of Professional Licensing, Real Estate, and Securities” [Report 2023-14].

An audit summary is found at the front of the report. The scope and objectives of the audit are included in the audit summary. In addition, each chapter has a corresponding chapter summary found at its beginning.

This audit was requested by the Legislative Audit Subcommittee.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

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Auditor General

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## SYSTEMIC AUDIT

### AUDIT REQUEST

The Legislative Audit Subcommittee selected the Department of Commerce (Commerce) for a systemic audit following *Utah Code* 36-12-15.1.

As part of the risk assessment, we found that three divisions: Professional Licensing (DOPL), Real Estate (DRE), and Securities could be enhanced with some improvements in their enforcement areas. The Utah Professionals Health Program (UPHP) within DOPL could also benefit from some improvements.

### BACKGROUND

One of the larger responsibilities of the Department of Commerce is to issue, renew, and regulate professional licenses. 22 percent of Utah's workforce require a professional license overseen by DOPL. The Department's objective according to *Utah Code* 13-1-2 is to "execute and administer state laws regulating business activities and occupations affecting the public interest."

## THE DEPARTMENT OF COMMERCE

### KEY FINDINGS

- ✓ 1.1 DOPL's response when medical professionals have substance use relapses should be reviewed. Some noncompliant licensees on probation continued to practice for many months.
- ✓ 2.1 The Utah Professional Health Program (UPHP) and DOPL do not have a shared definition of public harm, resulting in questionable referrals to the confidential program.
- ✓ 3.1 The Division of Real Estate (DRE) should update outdated policies to improve prioritization and processes.
- ✓ 4.1 Securities policies do not include a written policy to prioritize complaints based on severity, resulting in a lack of clarity over how complaints are assigned.



### RECOMMENDATIONS

- ✓ DOPL should ensure that policies and practices encourage timely intervention to stop the practice of probationers who present high risk to the public due to continued noncompliance while on probation.
- ✓ UPHP and DOPL should establish procedures to fully assess referrals to UPHP to ensure no public harm occurred consistent with the new policy.
- ✓ DRE should update its policies and procedures to include criteria to prioritize cases based on severity during the screening process.
- ✓ Securities should finalize the prioritization standards in policy to screen complaints on the newly established practice of ranking them based on public harm factors.

*Summary continues on back >>*

**REPORT SUMMARY**

***DOPL Should Implement Procedures for Timely Intervention with High-Risk Licensees on Probation***

DOPL enforcement is responsible for investigating, intervening, and monitoring professional license holders that could cause harm to the public. We found some instances where DOPL failed to act in a timely manner when some high-risk health care professionals displayed actions that could lead to potential public safety risks.

***Opportunities Exist for UPHP to Improve Processes and Better Resolve Some Serious Cases in a Timely Manner***

The Utah Professionals Health Program (UPHP) is a confidential alternative to public discipline for healthcare licensees with substance use disorder. Through our review, we found some concerns with how the program is administered.

***DRE's Enforcement Should Improve Its System to Prioritize Cases and Improve Processes***

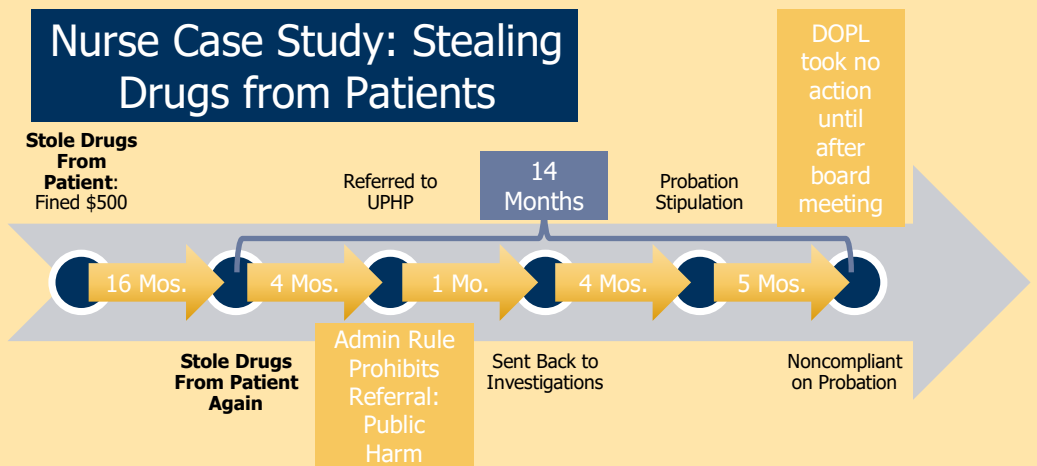
Current policies for the DRE do not include a method of prioritizing the assignment of more serious investigations over others. As a result, some serious complaints may be slow to be investigated and violating license holders are able to practice without being held accountable for years, or not at all.

***Securities Has Made Progress Since a 2008 Legislative Audit, but More Improvements Are Necessary***

We found that the division does not have a written policy to prioritize more serious enforcement complaints over others. Without a clear reason or assessment of potential public harm, it is unclear why some complaints are assigned to an investigator before others.

***DOPL should Review its Procedures to Ensure Timely Intervention in Egregious Cases***

The graphic shows an example of an egregious case where DOPL was aware of multiple substance abuse violations from a licensed nurse and failed to act in a timely manner.



More than 1 year following the second time stealing drugs, this nurse could legally practice while remaining unresponsive and noncompliant

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# Introduction

## The Department of Commerce Houses Unique Divisions, Providing Professional and Commercial Licensing and Regulatory Services

The Department of Commerce (Commerce) consists of six divisions and three offices that offer a wide range of services to the public. The goal of the agency is to instill trust in Utah’s professional workforce and commercial activities. This is accomplished by providing oversight of areas such as business registrations, consumer protection, public utilities, real estate, securities, and professional licensing. A legislative finding recognized that it is appropriate and necessary for state government to protect its citizens from harmful or injurious acts by persons offering or providing essential or necessary goods and services.<sup>1</sup> The primary responsibility of the Department of Commerce is to consider the public interest in these matters.



**The Department of Commerce’s goal is to instill trust in Utah’s professional workforce. A major responsibility of the agency is to issue, renew, and regulate professional licenses.**

Commerce issues, renews, and regulates professional licenses. For example, 22 percent of Utah’s workforce require a professional license overseen by the Division of Professional Licensing (DOPL) as part of their employment. The department’s objective, according to *Utah Code* 13-1-2, is to “execute and administer state laws regulating business activities and occupations affecting the public interest.”

### Our Systemic Audit Customarily Scopes Work Areas According to Risk

*Utah Code* 36-12-15.1 and the audit subcommittee prioritize an annual performance audit of executive branch entities and local education agencies that is conducted by the Office of the Legislative Auditor General. According to statutory language, these audits “evaluate the extent to which an entity has efficiently and effectively used the appropriation.” Given the nature of a systemic audit, we conducted an initial risk review of eight of the nine divisions and offices early in the audit process.<sup>2</sup> Following this initial review, we identified

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<sup>1</sup> *Utah Code* 13-1-1.

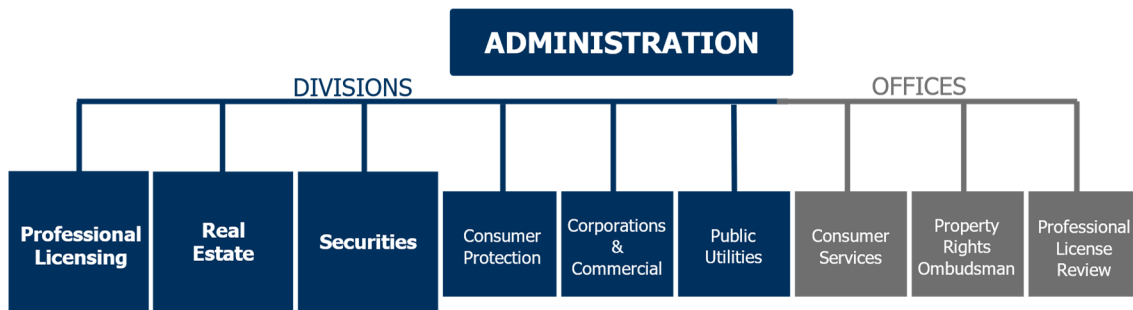
<sup>2</sup> Due to a recent audit, we did not conduct a review of the Division of Consumer Protection. For more information, see the *Performance Audit of the Division of Consumer Protection, 2021-05*.



**This report identifies three divisions with investigative and enforcement functions that pose potential risks to the public.**

potential risk areas in three divisions that house investigation and enforcement functions. These enforcement functions are tasked with protecting the public from harm caused by individuals with professional licenses or actions from unlicensed individuals. In some instances, we found that internal practices of these enforcement areas expose serious risks to the public and could benefit from process improvements.

The three divisions examined in this audit report are the Division of Professional Licensing (DOPL), the Division of Real Estate (DRE), and the Division of Securities (Securities). Additionally, we reviewed the newly established Utah Professionals Health Program (UPHP), which is housed under DOPL and deals with the monitoring of healthcare workers with substance abuse concerns. The divisions are highlighted in the following graphic.



Source: Auditor generated.

### Improvements Have Been Made Since Prior Audits

Each of the three divisions examined in this audit report provide important services that benefit the public but could be enhanced with some improvements. For example,

- Chapter 1 focuses on DOPL’s probation program. The division manages many probationers in various professions. We found that the division has made some improvements since a 2012 audit, but more improvements could be made to improve this program.
- Chapter 2 focuses on the UPHP program within DOPL. This program was created in 2020 from the previous Utah Recovery Assistance Program (URAP). It is a confidential program for healthcare professionals with substance abuse issues. The new program has made significant



improvements from the old program. However, we found areas that need further improvement to better monitor participants in the program.

- Chapter 3 focuses on DRE’s investigation process. The division has attempted to address the complaints received by the public in a timely manner. However, we believe that a prioritization policy and improvements to internal processes can assist the division to address complaints quickly.
- Chapter 4 focuses on the Securities investigation process. The division has internal methods to prioritize complaints based on division discretion and resources. The addition of a prioritization policy and improved documentation of investigative trails can assist the division to better manage their investigative process.

### **The Three Divisions Examined Are Largely Efficient at Issuing Professional Licenses, but Enforcement Areas Need Improvement**

During our examination of DOPL, DRE, and Securities, we found that their licensing process generally exceeds or nearly meets performance goals. For example:

- In 2022, DOPL consistently remained within three percentage points of its goal to complete 70 percent of licensing within seven days.
- DRE completed applications and renewals in an average of four days, consistently exceeding the division’s employee measures of seven days.
- The process for licensing in Securities is more complex than that of DOPL or DRE. Per statute, the timeline to provide a license is thirty days, unless more time is needed. It is common for licensing requests to go beyond thirty days due to the need to conduct a thorough review. The division reports that it internally tracks this process and is working on improving timelines for license requests.

Because the licensing practices in each division showed that they were exceeding, nearing, or meeting their goals, we focused our audit work on the investigation and enforcement functions within these divisions. More specifically, we reviewed how these divisions handle complaints from the public related to harmful activities conducted by licensees or unlicensed actions. This report makes recommendations on how these divisions can improve internal practices



of investigation and enforcement to better protect the public. The chapters of this report are organized as follows.

- 1 Improvements within the Division of Professional Licensing (DOPL) Probation Program
- 2 Improvements for the Monitoring Practices within the Utah Professionals Health Program (UPHP)
- 3 Improvements to the Division of Real Estate (DRE) Prioritization Policy and Process Flow
- 4 Improvements to the Division of Securities (Securities) Prioritization Policy and Documentation of Investigations

*Source: Auditor generated.*

**Utah Code 36-12-15.1** requires that our office review an agency’s budget, as is appropriate, as part of systemic performance audits. Several budgetary points of interest are reported in Appendix A. Appendix B provides information regarding the Prelitigation Medical Malpractice Panel and whether it is meeting its intended purpose.

### **A Department-wide Survey Found Most Employees Agreed the Agency Maintains a Positive Culture**

As will be standard with all systemic audits, our office conducted an organizational culture survey of the Department of Commerce during the early stages of the audit. Out of all employees, 77 percent responded to the survey, with 95 percent of respondents completing the survey in its entirety.

The survey asked employees to rate how strongly they agreed or disagreed with statements about organizational culture. The topics included employee morale, job satisfaction, leadership, and professional development. Overall, responses suggest a generally positive culture at the Department of Commerce. Survey results did not indicate additional risk areas and were not used to inform any additional audit work.



### BACKGROUND

The Division of Professional Licensing provides licensing and enforcement for more than sixty professions. This audit report focuses on the enforcement and probation process in high-risk professions like healthcare.

#### **FINDING 1.1**

DOPL's Response When Medical Professionals Have Substance Use Relapses Should Be Reviewed. Some Noncompliant Licensees Continued to Practice for Many Months

#### **RECOMMENDATION 1.1**

The Division of Professional Licensing should ensure that policies and practices encourage timely intervention to stop the practice of probationers who present high risk to the public due to continued noncompliance while on probation.

#### **FINDING 1.2**

Inconsistent and Delayed Action Has Occurred Due to Wide Discretion Exercised by DOPL Bureau Managers

#### **RECOMMENDATION 1.2**

The Division of Professional Licensing should establish standards, rubrics, or matrices for bureau managers to intervene quickly and fairly to a noncompliant license holder on probation and to ensure consistent responses to different violations.

#### **FINDING 1.3**

The Enforcement Relationship Between Professional Licensing Boards and DOPL Should Be Further Clarified

#### **RECOMMENDATION 1.3**

The Division of Professional Licensing should enhance policies and standards to provide a framework for the bureau managers and individual licensing boards to maintain consistency in enforcement outcomes and compliance with probationary orders.



### CONCLUSION

The Division of Professional Licensing can improve its probation program to ensure public safety. It is important for DOPL to take steps to respond to issues with consistency to minimize risks to the public. For bureau managers, licensing boards, and UPHP to effectively perform their duties, DOPL should provide guidelines on how they can work together to better serve licensees and the public.





# Chapter 1

## The Division of Professional Licensing Should Implement Procedures for Timely Intervention with High-Risk Licensees on Probation

The Division of Professional Licensing (DOPL) provides licensing and enforcement of statutes for more than sixty professions. DOPL enforcement is responsible for investigating and monitoring professional license holders who could cause harm to the public and intervening when necessary. Unlike licensing agencies in many other states, DOPL is one of the few licensing agencies designed to enable license regulators to make decisions and act independent of a governing licensing board. Best practice organizations and procedures in other states show that timely intervention is necessary for protection of the public and the recovery of the licensee who has substance use issues.

While there are several different ways that DOPL enforces licensing statutes, this audit report focuses on the monitoring of those on probation. Specifically, we highlight DOPL's monitoring practices for healthcare professionals on probation. This is due to the proximity of health care professionals to those in the public who may be in vulnerable positions. Additionally, medical professionals often have broader access to prescription medications. There are many dedicated and high-quality health care professionals, and the case examples noted in this chapter constitute only a small percentage of all license holders in the state.

We recognize the importance of allowing healthcare professionals to practice and maintain their license while on probation. This impact was especially felt when the COVID-19 pandemic increased the need for licensed healthcare workers to remain in their practice. DOPL's probation program plays an important role in monitoring professionals to ensure both public safety and provide professionals the opportunity to practice. The examples of delayed action displayed through this chapter show some areas where we believe DOPL needs to review its process and establish a standard to ensure timely responses in these probationary cases.



## 1.1 DOPL's Response When Medical Professionals Have Substance Use Relapses Should Be Reviewed. Some Noncompliant Licensees Continued to Practice for Many Months

We found some instances in health care professions where DOPL failed to act in a timely manner when high-risk health care professionals displayed actions that could lead to public safety risks. Our office found similar patterns of delayed intervention by DOPL in a prior 2012 audit.<sup>3</sup> It appears that delayed intervention for probationers exhibiting risk to the public has not been fully addressed in the years following that audit. We believe DOPL must review its process and establish a standard procedure to best react to situations that can threaten the public in a timely manner.



**Among some high-risk professions, we found instances where DOPL failed to act quickly enough to minimize risk to the public.**

### Our Review of DOPL Probation Focused on the 29 Probationers Who Had More Than Five Positive Drug Tests Each

We reviewed 221 positive drug tests split between 29 participants on probation. In most of these cases, DOPL bureau managers opted to wait for weeks to gain suggestions from professional licensing boards before determining consequences for the probationer. For instance, the average wait time between receiving a positive drug test and consulting licensing boards was 30.6 days in 154 of the 221 positive tests.<sup>4</sup> In some instances, probationers continued to accumulate other positive drug tests while DOPL waited for board recommendations.

Additionally, some probationers were allowed to continue practicing for months before the positive test result was brought to the board. The most egregious case was a probationer that was allowed to accumulate six positive drug tests before it was brought to the board. Best practices for monitoring those with substance abuse issues state that timely intervention is necessary to ensure that the proper level of care is given while they are in recovery. This review shows that board meetings cannot be the first intervention when DOPL could provide more timely

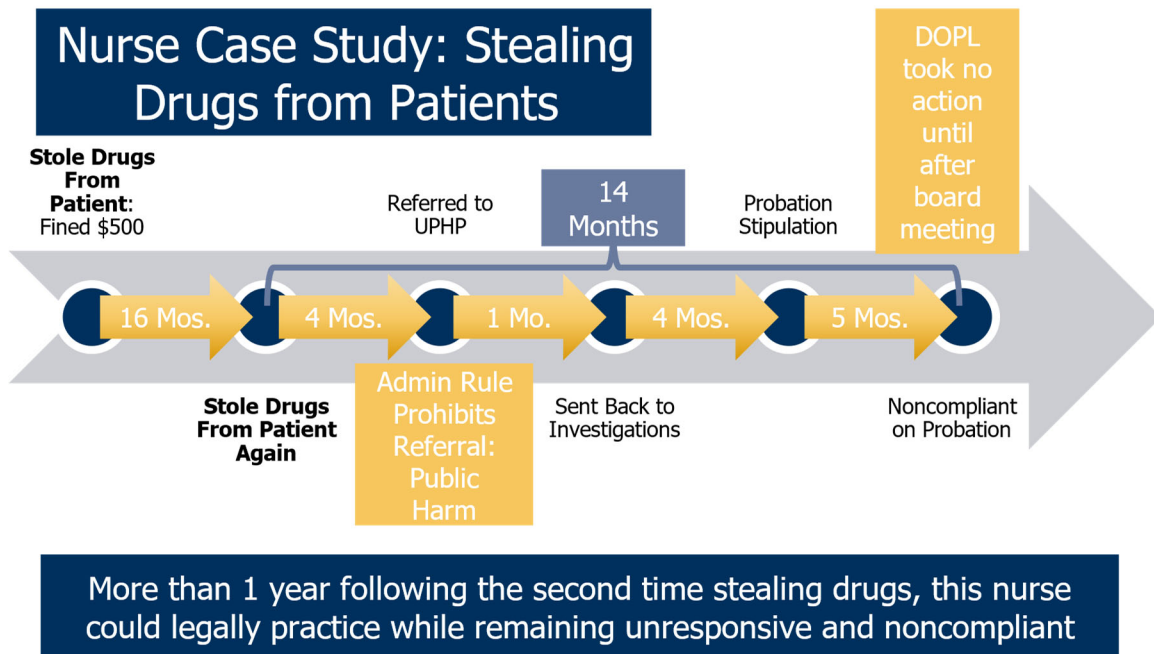
<sup>3</sup> See *A Performance Audit of The Division of Occupational and Professional Licensing, 2012-15*. More details are also found in the following section of this chapter.

<sup>4</sup> The remaining 67 of the 221 positive tests had other action taken or did not contain adequate information. For example, some probationers had their license revoked or surrendered, were in UPHP or the prior program (discussed in Chapter 2), were currently in treatment for substance use, or there was no documentation of a board meeting.



action to protect the public from potential harm. DOPL should review its processes and procedures to establish a standard to address noncompliant probationers in a timely manner.

The following graphic shows an example of a particularly concerning case where DOPL was aware of multiple substance abuse violations from a licensed nurse and failed to act in a timely manner to intervene.



Source: Auditor generated.

As shown in the graphic above, this nurse stole drugs from patients twice within a two-year span. In the second instance, the employer had video evidence of the nurse exchanging oxycodone with an allergy medication, resulting in the patient not receiving their pain management medication. Following the second instance of medication theft, DOPL investigators referred the nurse to the Utah Professionals Health Program (UPHP)<sup>5</sup> Program. This occurred four months after the medication theft. However, *Administrative Rule* prohibits individuals who have caused public harm to be referred to UPHP. Organizations such as the Centers for Disease Control and Prevention define the act of stealing medication from a patient as public harm. As such, we believe that the DOPL investigators never should have referred the nurse to UPHP. Even so, the nurse was contacted by UPHP for a month but did not respond to the program's efforts. The nurse

<sup>5</sup> UPHP is a confidential program for health care professionals with substance abuse issues. More information about UPHP is found in Chapter 2.



subsequently was referred to the DOPL investigations team. It took several months following this referral back to DOPL before the nurse was eventually placed on probation. Even after being placed on probation, the nurse remained noncompliant and did not respond to DOPL staff. After the nurse was placed on probation, DOPL was slow to intervene when the nurse continually failed to comply with the probation terms. For instance, the nurse was not actively monitored or present for drug tests during their probation period. After continual noncompliance spanning several months, DOPL finally took the information to the Nursing Board. The final probation report presented to the board stated that this nurse:

- Missed 97 check-ins.
- Had six no-shows for drug tests.
- Missed multiple monthly reports, self-assessments, therapy meetings, and employer reports.
- Did not respond to communication from the division.



**A nurse was legally allowed to practice for more than a year after being reported for stealing drugs and was not actively monitored.**

While this case is particularly egregious, similar details are repeated in different probation cases we examined. The following graphic displays three additional examples of nurses being noncompliant and DOPL delaying intervention.

#### Case Example A

A nurse on probation for substance abuse relapsed 16 times during a three-year period. The nurse tested positive for alcohol, marijuana, and methamphetamine. DOPL was aware of the noncompliance but did not intervene quickly. Rather, the bureau manager waited to report the noncompliance to the Nursing Board before acting.

#### Case Example B

A nurse was on probation for alcohol abuse and relapsed 7 times. The nurse was noncompliant with their probation agreement in many instances. The bureau manager opted to wait to report the noncompliance to the Nursing Board before acting.

#### Case Example C

A nurse on probation had 7 positive tests that included cocaine, alcohol, and other drugs. This nurse had a pattern of non-compliance for nearly two years until eventually further unprofessional conduct required the revocation of their license.

*Source: Auditor generated from DOPL data.*



These cases are concerning, as some license holders on probation with significant relapse issues are allowed to continue practicing without timely intervention. The statutes governing healthcare licenses prohibit substance abuse. DOPL has the authority and responsibility for intervening to protect the public when the division becomes aware of this kind of activity. Best practice organizations<sup>6</sup>, UPHP policy, and state nursing boards in Arizona and Colorado require or describe the importance of timely intervention following substance use relapse.

DOPL does not have written procedures to intervene quickly in probationary cases to protect the public where potential public harm exists. DOPL needs procedures to direct its actions as to when to intervene when a license holder’s substance abuse issues violate statute.

**DOPL does not have written procedures for probationary cases to intervene quickly to protect the public where potential public harm exists.**

### **DOPL Does Not Have a Timely Procedure to Stop Practice for Noncompliant Probationers While Maintaining a License**

Unlike licensing agencies in many other states, DOPL is one of few licensing agencies designed to enable license regulators to make decisions and act independently from a governing licensing board. In many other states, regulators must obtain consent from a professional licensing board before stopping practice or creating a probation agreement to regularly monitor the license holder for harmful behavior. However, Utah’s professional boards are advisory rather than regulatory; *Utah Code* 58-1-106 grants DOPL sole decision-making authority in probationary cases. Some actions that DOPL can take when probationers are noncompliant include: fines, public reprimands, emergency orders, extensions of probation, revocations, suspensions, or surrenders.

**DOPL has authority to act swiftly when public safety is at risk, but it has not defined a process to stop practice.**

Some DOPL staff reported that emergency orders could be the method DOPL can use to stop unsafe practice while maintaining the license for the probationer. We found that in the past five years, DOPL has used its emergency order authority only once to stop a medical professional from practicing because of continued substance abuse. When a license holder is placed on probation, they

<sup>6</sup> The Federation of State Physicians Health Programs and the American Society of Addiction Medicine provide guidelines which suggest that timely intervention is necessary for recovery.



often are required to conduct regular drug tests to ensure compliance with an agreed-upon stipulation.<sup>7</sup>

Probationers on a stipulation agreement for a substance use issue are instructed to remain abstinent. It has been reported that this could make it easier to discipline the individual for any noncompliance, because they maintain a legal document consenting to regular drug testing. However, DOPL did not intervene quickly in some instances where drug tests were missed or found to be positive. Due to DOPL's authority to intervene quickly in cases of public harm, we question why there were not more timely responses to the continued noncompliance of some license holders on probation.

This results in noncompliant individuals continuing to work as health care providers with little accountability for substance abuse relapses. We recommend that DOPL establish a standard procedure to stop a probationer from practicing, while being able to maintain their license. This will assist in mitigating possible public harm from license holders practicing while under the influence of prohibited substances.

### **DOPL has Improved Its Organization Since a 2012 Audit, But Some Deficiencies Still Remain**

Our 2012 audit report recommended a clear process for monitoring probation and reporting violations. DOPL made changes to address issues brought up by the audit, including:

- DOPL changed its procedure for probation violations from formal to informal processes, resulting in a more rapid response.
- DOPL was given authority by the Legislature to issue citations to those who violate probation. DOPL also has a comprehensive citation policy.
- DOPL created a policy for investigative cases that go beyond specified timeframes. This was created to minimize the number of cases that go beyond those time frames.

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<sup>7</sup> A stipulation is a legal document that a license holder on probation must comply with. Stipulations often are drafted following a documented instance where the license holder was found to have exhibited unprofessional behavior. DOPL works with the Utah Office of the Attorney General to produce these stipulations for license holders.



Despite some reported changes over the years, we found that some of the same deficiencies in DOPL’s monitoring and intervention practices persist. The following findings from the 2012 audit still need to be fully addressed:



**We found that some of the same deficiencies in DOPL’s monitoring and intervention practices persist.**

- Some probationers are allowed to accumulate numerous violations before DOPL responds.
- DOPL should clarify policies for imposing consequences on probation violations.
- DOPL should review and clarify decision-making responsibilities.

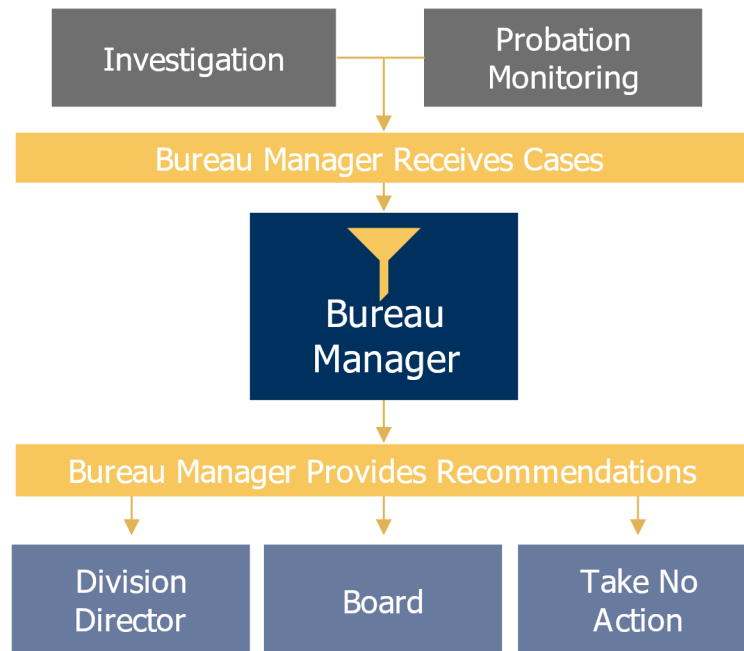
As such, we believe that DOPL should ensure that policies, practices, and procedures better protect the public from noncompliant probationers.

**RECOMMENDATION 1.1**

The Division of Professional Licensing should ensure that policies and practices encourage timely intervention to stop the practice of probationers who present high risk to the public due to continued noncompliance while on probation.

## **1.2 Inconsistent and Delayed Action Has Occurred Due to Wide Discretion Exercised by DOPL Bureau Managers**

Licensing bureau managers lead teams of specialists who issue occupational licenses for multiple professions. Bureau managers also act as a filter for enforcement and monitoring actions. For example, probationer noncompliance is reported to the bureau manager that oversees that license. We recognize that because of the large workload of bureau managers, it may be difficult to ensure fairness and quick action for probationers. However, the bureau manager still has a significant amount of responsibility and discretion regarding how to proceed when provided with information about a noncompliant probationer. Such discretion led to inconsistency in discipline and in many cases leave noncompliant probationers working in their field. Some of the actions a bureau manager could take are seen in the following graphic.



*Source: Auditor generated.*

### **We Found Cases Where Individuals Continued to Relapse While on Probation without Immediate Action from Bureau Managers**

Bureau managers are often the final decision makers on how to respond to a noncompliant probationer. During investigations of possible violations, the bureau managers play a key role in determining whether there is enough evidence to lead to a division action, such as probation. Once a license holder is on probation, bureau managers are involved in monitoring individuals and work with compliance staff when a probationer displays issues such as:

- Missed or positive drug tests.
- Changes to criminal records.
- Failure to attend therapy or other evaluations.
- Three missed check-ins.

Current policies provide wide discretion to the bureau managers on how to respond to these types of noncompliance. For example, bureau managers have



broad discretion on whether serious misconduct becomes actionable or if it should be brought to the professional licensing board to be discussed.

### **Selections from division policies describing wide discretion:**

*"Bureau managers shall be responsible for writing orders..."*

*"Bureau managers shall be responsible for licensing decisions related to probationers."*

*"Bureau managers shall use their own judgement in deciding which issues will be taken to the board."*

This broad discretion often results in delayed action being taken to intervene in cases of probationer noncompliance. For example, compliance staff report that they inform the bureau managers of cases where probationers exhibit repeated noncompliance. But the bureau managers often wait to bring the issue to the professional license boards for discussion rather than intervene immediately. Meanwhile, the noncompliant probationer is allowed to continue practicing in their field. Depending on the licensing board, this may leave weeks or months between a relapse, missed drug tests, or other noncompliance before any action is taken.



**Following probationer noncompliance, bureau managers often wait to bring the issue to the professional licensing boards rather than intervening immediately. The probationer can continue to practice for weeks or months while waiting for the board meeting.**

Such wide discretion may also lead to inconsistency in the way probationers are disciplined. Bureau managers do not utilize a standard practice that imparts similar consequences for similar violations. In each of the case examples earlier in this chapter, the bureau manager was involved in deciding which violations to send to the board for fines or other consequences and which violations would not. Without adequate guidelines to inform decision-making, bureau managers make varied decisions for probation violations. Furthermore, there is no method to evaluate whether the decisions of bureau managers are consistent.

**Other States Have More Consistent Guidelines for Disciplining License Holders to Provide Greater Consistency.** Some states, such as Texas, Arizona, and Virginia, provide matrices, standards, and rubrics that help give benchmarks for what should occur for various violations in the different professions. They also consider aggravating factors in certain circumstances that strengthen the



need for more immediate or harsher action. Although every case is different, we believe that the inclusion of consistent guidance for each profession can assist bureau managers in providing fair, consistent, and quick action to noncompliant probationers. Additionally, we reiterate recommendations made in the 2012 audit to establish a procedure so that bureau managers can act quickly, if necessary, rather than wait for convening the next scheduled professional licensing board.

#### RECOMMENDATION 1.2

The Division of Professional Licensing should establish standards, rubrics, or matrices for bureau managers to intervene quickly and fairly to a noncompliant license holder on probation and to ensure consistent responses to different violations.

### **1.3 The Enforcement Relationship Between Professional Licensing Boards and DOPL Should Be Further Clarified**

In Utah, professional licensing boards are advisory rather than regulatory. These boards provide suggestions to DOPL staff and bureau managers on possible actions that could be taken. That said, DOPL is the centralized agency where regulatory and decision-making authority resides. Bureau managers work with individual licensing boards to monitor and discuss potential action for probationers. However, our audit found that the enforcement relationship between DOPL staff and the professional boards should be further clarified. Boards and bureau managers deferred decision-making to each other, resulting in delayed decisions for noncompliant probationers. When such decisions are delayed, further opportunities may arise for healthcare professionals to harm the public or be intoxicated at work. As an example, if a physician is on probation for substance abuse issues, the bureau manager and DOPL staff seek advice from the Physician and Surgeon Board. While the board can make suggestions related to the probationary physician, it does not have the authority to make the final decision on the license.

Many of these professional boards are made up of working professionals and meet only a handful of times a year. Board members do not have the capacity to regularly oversee the compliance of probationers. Rather, DOPL's full-time compliance staff and bureau managers are responsible to oversee the compliance of probationers. Our concern is that DOPL has not instituted policies and



**The result of not having policies for timely intervention is an increased risk to the public.**

procedures to govern the process. Therefore, it is unclear who should act first (DOPL or the boards) in cases where public safety is an immediate concern. The result of not having policies for timely intervention is an increased risk to the public.

### Licensing Boards and Bureau Managers Often Defer Decision-Making Authority to the Other Entity

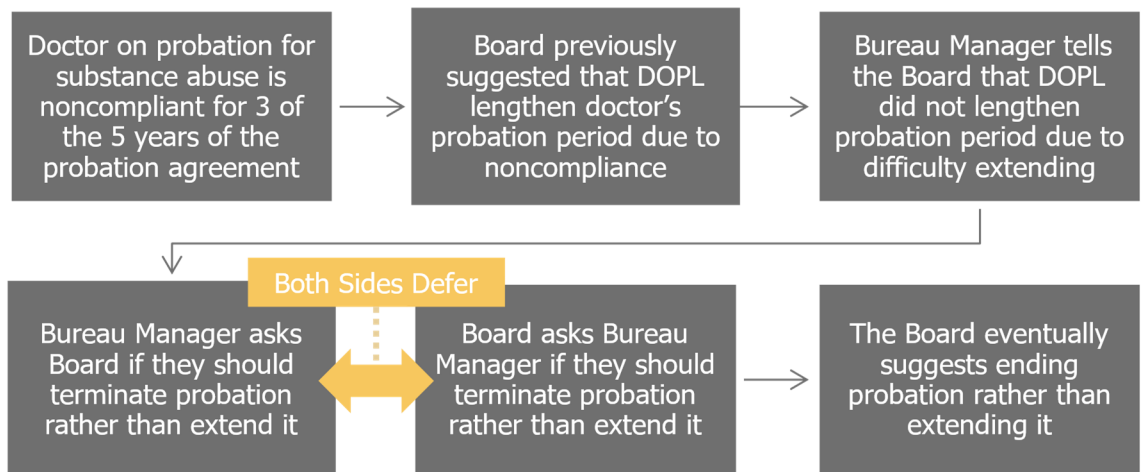
As shown in the case example at the beginning of this chapter, we found instances where an individual was noncompliant for a long period of time before anything occurred because bureau managers waited for the advice of the professional board. In this case, the bureau manager continued to instruct the compliance staff to simply record the noncompliance, despite it taking five months before being presented to the Nursing Board. This allowed the noncompliant nurse to practice for many months without being held accountable.



**Bureau managers often wait for the board before acting, leaving weeks or months before any agency action is taken.**

We saw some instances when board members and bureau managers deferred to each other when making decisions for probationers. For example, in one board meeting we observed, the board and bureau manager asked each other to make the final decision regarding a physician on probation who exhibited periods of noncompliance. That example is detailed in the following graphic.

### Board Meeting Where the Bureau Manager and the Board Deferred to One Another



Source: Auditor generated.



In this instance, the physician was noncompliant for the three years of their five-year probationary agreement. However, the board and bureau manager struggled to decide if the probation should be extended and deferred to each other for a final decision. Ultimately, the decision was made not to lengthen the



**Board and DOPL decisions should be based on best practices, not the difficulty of the process.**

probationary period, as extending it would be a difficult process. The reason given for the difficulty of the process is that it requires working with multiple parties, such as the Office of the Attorney General, to rewrite or extend the probation stipulation. As a result, the physician in this example was released from probation.

In an interview for this audit, the chair of one of the medical boards reported that the board simply suggests options to the bureau manager and that they do not maintain standards on how to respond to probationary cases. The chair reported that it is DOPL's responsibility to make decisions regarding a noncompliant probationer, and that DOPL is allowed to act without board approval. However, our interviews with DOPL bureau managers indicate, it appeared that they prefer to wait for decisions to be made by the professional boards and rarely act on noncompliance issues outside of intermittently scheduled board meetings.

The addition of policies to better define the roles and responsibilities of DOPL staff and professional boards can improve the clarity between the two entities. This can lead to quicker and more defined interventions for noncompliance.

### **Guidance and Standards Could Assist Professional Boards to Make More Consistent Recommendations to DOPL**

Recommendations provided by the different professional boards appear inconsistent. A board chair explained the difficulty of being a working professional who lacks the time needed to adequately research and understand probationary cases—especially when board members are given little training or guidance. While professional boards provide needed insight, the lack of a standard framework for board engagement results in inconsistent suggestions when responding to noncompliance. For example, one board may let a license holder off probation halfway through their stipulated probation time if they have only minor violations and show periods of compliance. Other boards may require probationers to remain on probation much longer for similar violations. DOPL staff also explained that the consequences for noncompliance can differ between the boards. The Nursing Board, for example, may issue a fine for a probationer



**Boards have little guidance or training, so they often make inconsistent decisions.**



with a substance abuse relapse. The Physician and Surgeon Board, however, may determine to extend the period of probation rather than issue a fine.

The different boards currently lack the ability to define, measure and track enforcement actions. This creates an environment where the boards may be unsure of the decisions they should make. We believe that as DOPL provides more consistent guidance for bureau managers, the division also should develop policies and standards to help the boards to understand possible options for noncompliance and ensure better consistency.

### **RECOMMENDATION 1.3**

The Division of Professional Licensing should enhance policies and standards to provide a framework for the bureau managers and individual licensing boards to maintain consistency in enforcement outcomes and compliance with probationary orders.





### BACKGROUND

The Utah Professionals Health Program provides monitoring for healthcare professionals with substance use disorders. UPHP provides an important function, allowing healthcare professionals the opportunity to join the program in lieu of the normal discipline process at DOPL. This chapter provides recommendations to help the program improve in some key areas.

#### **FINDING 2.1**

UPHP and DOPL Do Not Have a Shared Definition of Public Harm, Resulting in Questionable Referrals to the Confidential Program

#### **RECOMMENDATION 2.1**

The Utah Professionals Health Program and Division of Professional Licensing should establish procedures to fully assess referrals to the Utah Professionals Health Program to ensure no public harm occurred consistent with the new policy.

#### **FINDING 2.2**

The Utah Professionals Health Program Sometimes Lacks Timely and Consistent Treatment

#### **RECOMMENDATION 2.2**

The Utah Professionals Health Program should evaluate and modify policies to establish frameworks that include tiered interventions to assist in making decisions for participant noncompliance to enhance consistency and protect the public.

#### **FINDING 2.3**

UPHP and DOPL Should Continue to Improve Methods of Internal Evaluation

#### **RECOMMENDATION 2.3**

The Utah Professionals Health Program should continue to enhance oversight and internal evaluation to ensure the program meets its purpose and staff are performing compliance tasks in line with best practices.



### CONCLUSION

UPHP and DOPL have been engaged in many program improvements over several years. We recognize important improvements have been made. This report provides additional recommendations to further help the program improve. UPHP should ensure that adequate assessments are done before entrance to the UPHP program. The sometimes inconsistent treatment in UPHP may place the public at risk if interventions do not adequately address the severity of the noncompliance. UPHP will need more continual evaluation to ensure quality service.





## Chapter 2

# Opportunities Exist for Utah Professionals Health Program to Improve Processes and Better Resolve Some Serious Cases in a Timely Manner

### 2.1 UPHP and DOPL Do Not Have a Shared Definition of Public Harm, Resulting in Questionable Referrals to the Confidential Program

The Utah Professionals Health Program (UPHP) is a confidential alternative to public discipline for healthcare licensees with substance use disorder.<sup>8</sup> Our concerns are not necessarily reflective of the program as a whole, but we found instances of concerning cases that demonstrate the need for clear definitions and policies. We recognize the program provides an important service and our concern is not with the program but with areas where the program can be tightened to ensure it is operating as intended. Rather than be placed on public probation, participants in the UPHP program are monitored confidentially<sup>9</sup> so they may continue to practice in their field while recovering from substance abuse issues. *Administrative Rule* establishes that if a licensee causes harm to the public, they are prohibited from participating in the confidential UPHP program.

We believe some of these instances warrant further assessment to ensure no public harm occurred or should not be referred to a confidential program like UPHP.

The first example shows an instance that we believe constitutes clear public harm, yet was referred to the UPHP program:



***Administrative Rule prohibits licensees from participating in UPHP if they cause harm to the public, however we found instances where this may have occurred.***

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<sup>8</sup> The current UPHP program only allows healthcare professionals to participate. Other license types are not included in the current structure of the program and would be placed on public probation for any violations or public harm.

<sup>9</sup> Confidentiality means that UPHP does not share information with DOPL without high levels of public safety risk. Additionally, the public cannot see who is in the UPHP program, unlike license holders on probation through DOPL.



### Case Example A

A nurse stole Oxycontin from a patient under their care. This theft of medication can be seen as public harm. They were reported to DOPL after the facility noticed a discrepancy in the patient's medications upon discharge. DOPL Investigations referred this case to UPHP and indicated that no public harm occurred in the referring paperwork.

*Source: Auditor generated from UPHP data.*

This is concerning as the theft of this medication impeded the patient's ability to receive the appropriate standard of care and level of pain mitigation needed. Instances like Case A display clear public harm when medications are taken or substituted for a different medication.

We also found that the UPHP program and DOPL provide little to no assessment to ensure public safety in other instances that are less clear. The following examples provide instances where it is unclear if a referral to UPHP was appropriate:

### Case Example B

A nurse with administrative rights to a drug dispensing machine stole what they claimed were extra medications. The nurse used patients' names to obtain pain medications. The nurse claimed the patients already received their full doses, but the investigation did not evaluate whether these additions to the medical records limited patients from receiving needed medications.

### Case Example C

A nurse contacted UPHP after being asked to self report by their employer. The nurse admitted to stealing Fentanyl, but no investigation was conducted to determine if the medication was meant for a patient, or if the nurse was under the influence at work.

### Case Example D

An intoxicated nurse believed they were okay to work. However, other hospital staff noticed the nurse was intoxicated and asked them to take a urinalysis test, which they refused. No investigation was conducted to determine if the nurse put the public in danger while practicing under the influence.

*Source: Auditor generated from UPHP data.*



While these cases may not exhibit clear public harm, such as medication theft from a patient, they provide examples of areas where UPHP and DOPL likely



**We recognize that many of the cases UPHP deals with are handled appropriately. Nevertheless, the cases we identified are serious and demonstrate the need to review procedures and process.**

should assess further to ensure licensees are not harming the public before referral to the UPHP program. We recognize that many of the cases UPHP deals with are handled appropriately. We commend the program for the handling of those cases. Nevertheless, the cases we identified are serious and demonstrate the need to review procedures to ensure they are operating as intended. Not every licensee with substance use issues harms the public. However, there should be a stronger standard to assess the risk in situations where it is unclear when the case comes

to DOPL or UPHP. Before being able to assess public harm, DOPL and UPHP need to first define what public harm is.

### **Ambiguity In Policy Should Be Fixed to Ensure Referrals to UPHP are Appropriate**

We found that DOPL and UPHP did not have a shared definition of what constitutes public harm. Through an examination of internal policies and interviews with both DOPL and UPHP staff, we discovered that the entities had different definitions of what constitutes public harm. For example, at the beginning of our audit UPHP policies did not preclude licensees from participating in the program who steal or substitute drugs from a patient under their care. Yet, DOPL administration stated they believed a licensee stealing or substituting drugs from a patient would constitute public harm.

DOPL's statement is in line with the definitions from multiple healthcare professional organizations and the Center for Disease Control and Prevention (CDC). The CDC states that "Healthcare providers who steal prescription medicines or controlled substances such as opioids for their own use put patients at risk." It also details three types of patient harm this can cause:

- Substandard care delivered by an impaired healthcare provider.
- Denial of essential pain medication or therapy.
- Risks of infection if a provider tampers with injectable drugs.

To be clear, we are not advocating or recommending a definition of public harm. We are providing background and context and recommend that DOPL and UPHP engage in a process where they research the best definition and then clearly and consistently apply the definition.



In many cases, DOPL is the entity that initially receives complaints about healthcare licensees with potential substance abuse concerns. DOPL refers these complaints to UPHP. However, ambiguity in DOPL policies and procedures



**DOPL investigative staff provided little to no assessment before referral to UPHP.**

allowed these referrals to be made with little or no assessment to determine if public harm has occurred. DOPL's investigative staff reported that if the complaint included any type of substance use, they provided little to no assessment before referral to UPHP. UPHP can also receive referrals to the

program directly, but the entity does not maintain an investigative team or have other methods to determine if public harm occurred. As such, some licensees have gained access to the UPHP program when public harm may be present.

Part of the cause for questionable referrals is that DOPL investigative staff were operating under policies that were implemented in 2013. The 2013 policies contained outdated procedures to refer substance abuse complaints to the now nonexistent Utah Recovery Assistance Program (URAP) program, the precursor of the UPHP program.<sup>10</sup> However, statute for the UPHP program requires more stringent standards for acceptance in the program. It is concerning that an old policy relating to a defunct program was still being used to refer substance abuse licensees to the new, and more stringent UPHP program. Despite previously drafting a new policy, it was not put in place until recently.



**UPHP and DOPL were operating under outdated 2013 policies drafted for the old program.**

During the audit, DOPL and UPHP were made aware of the concern with drug substitution and began modifying the investigative policies that define the referral process and relationship between the two entities. As we raised our concerns related to UPHP referrals with DOPL leadership, they immediately began to incorporate more stringent entrance criteria into a new draft of their investigations policy. We are encouraged by this response. However, that policy only recently went into effect on August 24, 2023, as audit work was concluding so we were not able to test its effectiveness. Along with the new inclusion of a shared definition of public harm, DOPL should ensure that a sufficient assessment is completed when there are substance abuse concerns prior to referring licensees to UPHP.

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<sup>10</sup> Our office conducted an audit in 2012 on the URAP program. More information is found below in finding 2.3. See audit number 2022-15 for additional information.



## Two States Specifically Ban Drug Substitution from Similar Programs

Through our research of similar programs, we found two states who have more explicit entrance criteria into a program similar to UPHP. Arizona and Ohio have specific rules or policies that ban licensees who have stolen or replaced drugs from patients from their confidential programs. Arizona's program has a policy which prohibits, "behavior that has high potential to cause patient harm such as diverting drugs by replacing the drug with another drug..." Ohio's administrative code prohibits individuals who have: "substituted or tampered with a substance or drug of abuse."<sup>11</sup> This does not mean that they cannot participate in other disciplinary actions such as a probationary agreement, but those programs and the associated agreements are visible to the public, meaning that patients can become aware of the sanctions placed on their license. As mentioned above, DOPL has now implemented more stringent entrance standards including that drug substitution is public harm and should preclude licensees who have substituted drugs from entrance to UPHP.



**Arizona and Ohio have specific rules or policies that ban licensees who have stolen or replaced drugs from patients from their confidential program.**

### RECOMMENDATION 2.1

The Utah Professionals Health Program and Division of Professional Licensing should establish procedures to fully assess referrals to the Utah Professionals Health Program to ensure no public harm occurred consistent with the new policy.

## 2.2 The Utah Professionals Health Program Sometimes Lacks Timely and Consistent Treatment

Participants in the UPHP program are placed on at least a five-year contract to support substance use disorder recovery and allow licensees the opportunity to continue to practice their profession. As mentioned, participation in the program is confidential and information related to the substance use issues are not available to the public. To monitor participants' progress, the program requires periodic drug and alcohol screening as well as other reports from employers and therapists. These programs are common in other states and can serve as a mechanism to help individuals work in their profession while under supervision. Our concern is that as Utah has implemented the new UPHP program, the policies governing the program have not been adequate and need further review.

<sup>11</sup> Ohio Administrative Code: Rule 4723-6-02



When an individual becomes noncompliant with their contract or tests positive for unallowed substances, UPHP policy requires staff to intervene quickly to ensure that participants continue their recovery.

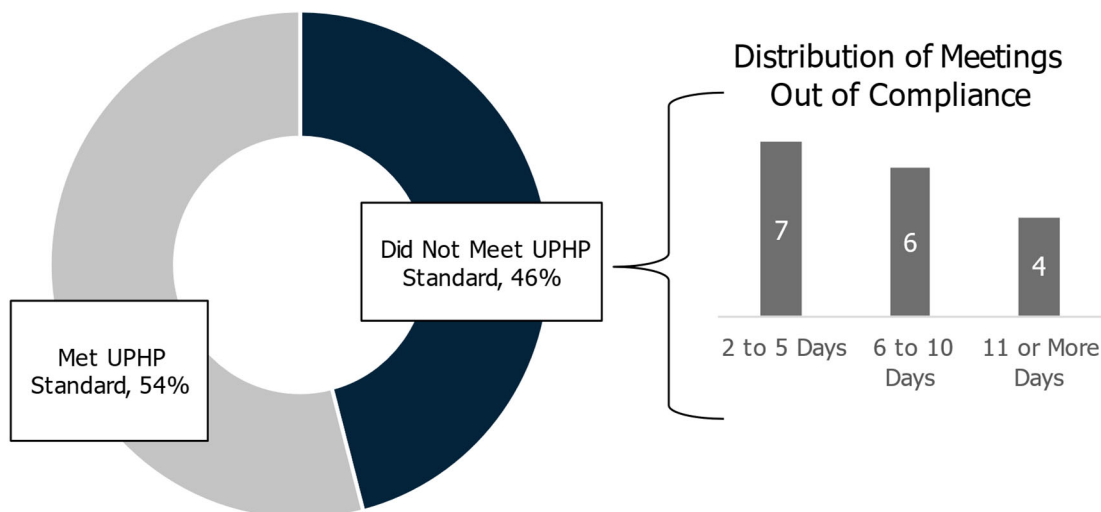
UPHP policy requires staff to meet with participants within 1 business day of a positive drug test. However, we found many instances where participants were not met for days or weeks following a positive drug test. UPHP often contacted participants via a messaging system but did not meet with many of them for multiple days. This does not align with UPHP's policy standard, which is to intervene and discuss possible options such as stopping practice or other safety and recovery measures. We reviewed all positive drug tests that have occurred since the initiation of UPHP in 2020. Figure 2.1 summarizes all positive tests for participants in UPHP, as well as the time between UPHP receiving test results and when it met with the participant. Some tests did not include documentation for any meeting or had sufficient evidence for why a meeting did not occur.<sup>12</sup>

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<sup>12</sup> Several common reasons that tests were left out of this figure include if they were currently attending substance use treatment or the participant admitted relapse before UPHP received the test back.



**Figure 2.1 Some Participants Who Have Tested Positive for Drugs Do Not Have a Meeting Within One Business Day.** We examined all drug tests since the initiation of the UPHP program in August 2020 to August 2023. This data only includes participants that had a positive test. The data shows the time between when UPHP received test results and the time taken for UPHP to meet with the participant.



*Source: Auditor Analysis of UPHP Case Notes*

Some of these instances shown in Figure 2.1 included individuals who were currently practicing in their healthcare profession. This is concerning as there is a potential risk of licensees practicing while under the influence or attempting to obtain unallowable substances. Because of this level of risk, we believe that UPHP should strictly follow their policy of intervening within 1 business day to ensure public safety. UPHP has reported that meeting with the individual within one business day is a difficult standard. It reports that it is working through the process of changing this policy. However, we recommend that UPHP ensure that its new policy balances quick intervention to protect the public as well as assist the participant with recovery.



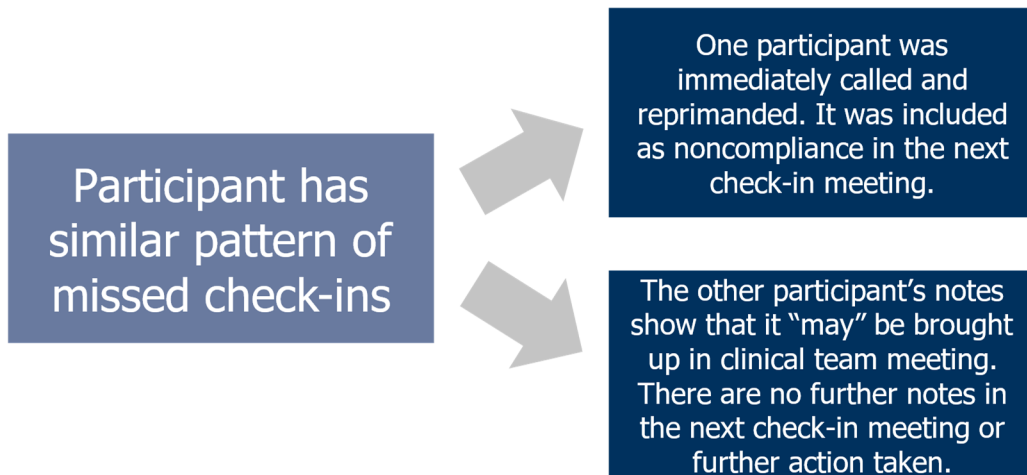
## Current UPHP Policy Can Result in Inconsistent Treatment and Monitoring

The current policies and practices of UPHP provide wide discretion to staff without consistent guidance for what should occur if a participant is noncompliant. The wording in policy suggests that intervention is optional by stating that interventions “may” occur following noncompliance or relapse. Many interventions for participant noncompliance are based on seeking a consensus among UPHP staff and the medical director. While it is possible that decisions by individual staff or group consensus can work in certain situations, it can create the opportunity for inconsistency and unfairness among participants. We found that drug testing is not the only area where there can be inconsistency in practice at UPHP. One example of this was two participants in a similar circumstance shown below:



**Inconsistent treatment in UPHP does not create fairness and may place the public at risk if interventions do not adequately address the severity of the noncompliance.**

Current Policy: UPHP clinical staff shall communicate with participant within one (1) business day to review behaviors, express concern about risk, seek participant’s perspective, and discuss possible interventions to increase support and reduce risk.



Source: Auditor generated.

This consensus approach sometimes results in widely different interventions for participants with similar noncompliance problems. Additionally, it can place the public at risk if the intervention does not adequately address the severity of the noncompliance. We believe that more consistency of policy and practice could provide better treatment outcomes and provide the best outcomes for public safety.



The Federation of State Physician Health Programs (FSPHP) provides best practices on how programs like UPHP should operate. Their best practice guidelines emphasize the importance of policies that create consistent and tiered interventions for practitioners who are noncompliant with program agreements.

#### **FSPHP statement on consistency:**

*“By consistently applying objective and verifiable accountability measures, PHPs and the participants develop and maintain credibility with the public as well as positive relationships with regulatory agencies and credentialing entities.”*

The use of consistent monitoring and interventions also establishes clear expectations for the participants upon entrance to the program. Participants will better understand what potential consequences will occur if they are noncompliant. While the FSPHP guidelines note that it is important to maintain some discretion based on the clinical assessment of the staff, establishing clearer frameworks for the graduated response to noncompliance will allow UPHP staff to facilitate adequate and fair interventions.

#### **RECOMMENDATION 2.2**

The Utah Professionals Health Program should evaluate and modify policies to establish frameworks that include tiered interventions to assist in making decisions for participant noncompliance to enhance consistency and protect the public.

### **2.3 UPHP and DOPL Should Continue to Improve Methods of Internal Evaluation**

Our office conducted a 2012 audit that included UPHP’s predecessor, the URAP program. This report presented some recommendations to improve the program.



**Several evaluations of UPHP’s predecessor continued to see similar issues that we saw in the current program.**

Specifically, it identified a lack of internal evaluation and poor management as key elements that needed to be improved. These recommendations were not fully implemented, and the program continued to struggle. In 2019, DOPL requested a large-scale evaluation of the program. That evaluation shared some of the continuing issues with the program and provided extensive recommendations for how a new program

could be developed to help licensees with substance use issues more effectively. Based on those recommendations, DOPL and the Legislature worked together to



create the new UPHP program in 2020. Since the implementation of that program, UPHP staff have worked to improve the program through the development of these, and other, important practices and policies:

- Refrain from practice agreements
- Consistent risk assessment tools
- Increased testing frequencies
- Evaluator trainings
- An evaluation matrix

We are encouraged by the progress that was made with these changes. Even with this important progress, there remains a need for consistent measurement and evaluation to assess its continual success. The UPHP program manager has already begun to conduct some important internal evaluations of the program but is still seeking to implement more ongoing effectiveness evaluations.



**Progress has been made with the UPHP program, but further success will require more consistent evaluation than has been provided historically.**

The FSPHP guidelines point to 16 possible examples of quality assurance or improvement evaluations that can be done to provide “proactive self-scrutiny and transparency and to demonstrate the quality of clinical service delivery.” UPHP has used these guidelines to develop the program and as a starting point to build new evaluation tools. Several of these guidelines would address the concerns we saw during the audit related to risks to public safety and timeliness of interventions in cases of relapse. These include:

- Quantifying the measures taken to assure patient safety.
- Evaluating the length of time taken to identify and subsequently report an unsafe referral or participant to the regulatory agency.
- Studying the number of positive drug tests...and the PHP’s response time to intervention.

We believe UPHP should continue to enhance their structured and ongoing internal evaluations of the program. Internal evaluations could more proactively address issues with current policies, practices, and procedures.

### **DOPL Could Increase Cooperation With UPHP Through Greater Oversight**

While DOPL maintains authority over UPHP, it provides little oversight regarding the performance of the program. One reason DOPL has opted for less oversight of UPHP is because the program seeks to achieve confidentiality. There



are opportunities for UPHP to be held accountable to DOPL or Commerce administration while still maintaining participant anonymity. These could include removing personally identifiable information from UPHP participant data and reporting on general outcomes rather than specific participants. We believe that Commerce administration, DOPL, and UPHP should work together to define potential methods of enhanced oversight.

Another way for the Commerce administration or DOPL to provide better oversight is to assign a designee to be the chair of the UPHP Executive Committee. The governing statute for UPHP provides that:

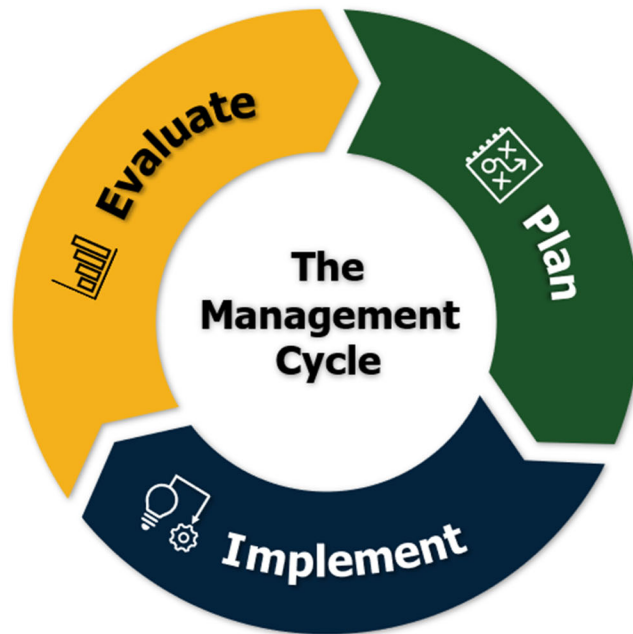
**Utah Statute 58-4a-104**

*“The executive director of the Department of Commerce, or the designee of the executive director of the Department of Commerce, who shall serve as chair.”*

The current executive director’s designee to chair the UPHP Executive Committee is the program manager of UPHP. As such, staff from the Commerce administration or DOPL leadership are not involved in providing oversight through the committee. We believe that another designee from the Commerce administration or DOPL could help provide greater oversight when making improvements to UPHP.

**Our Office’s Best Practices Handbook Provides a Framework for UPHP to Implement Effective Management and Evaluation**

The Office of the Legislative Auditor General recently released *The Best Practice Handbook* for successful government operations. The handbook provides information on how to effectively implement what is called the Management Cycle framework. We believe this framework can also assist UPHP to evaluate the success of the program. The following graphic illustrates the Management Cycle:



*Source: OLAG's Best Practice Handbook.*

The Management Cycle and best practices found within the handbook can be tailored to the needs of the organization. While DOPL and UPHP have used prior evaluations to plan and create a more successful program, we believe that there needs to be continued internal oversight within the UPHP program to ensure it is meeting its objectives: to protect public safety and provide an effective alternative to public discipline.

After UPHP and DOPL have measured and evaluated the program, the process begins again. The plans, policies, and procedures of the organization should be recalibrated to better serve the public and the program participants.

#### **RECOMMENDATION 2.3**

The Utah Professionals Health Program and Division of Professional Licensing should continue to enhance oversight and internal evaluation to ensure the program meets its purpose and staff are performing compliance tasks in line with best practices.



### BACKGROUND

The Division of Real Estate regulates the licensing of the appraisal, mortgage, and real estate industries. As of 2022, the division has 40,426 licenses and registrations in Utah. The division receives complaints from the public for violations regarding both licensed and unlicensed activity. If DRE has jurisdiction over the alleged violations, it will open a case and investigate. Alongside DRE are three commissions for each industry that assist in decision-makings regarding the violations of law by licensees.

#### FINDING 3.1

The Division Should Update Outdated Policies to Improve Prioritization and Processes

#### RECOMMENDATION 3.1

The Division of Real Estate should update its policies and procedures to include criteria to prioritize cases based on severity during the screening process.

#### FINDING 3.2

The Division's Investigative Process Can Improve to be More Efficient and Result Driven

#### RECOMMENDATION 3.2

The Division of Real Estate should review its organizational structure and internal procedures for a more efficient investigative process.



### CONCLUSION

DRE plays an important role in protecting the public from license holders who violate real estate laws. The division has been working to improve its internal investigative processes. Findings in this chapter will further assist to improve DRE's policies and investigation processes. DRE policies should be updated to include a method of prioritizing serious investigations. Some cases may go years before being investigated and may risk going beyond the statute of limitations. DRE's investigative process contains inefficiencies that could be improved for better case management. We believe that changes to DRE's process flow and prioritization policies could significantly improve the backlog of work and help DRE to complete cases more efficiently.





## Chapter 3

# The Division of Real Estate's Enforcement Should Improve Its System to Prioritize Cases and Improve Processes

### 3.1 The Division Should Update Outdated Policies to Improve Prioritization and Processes

Current policies for the Division of Real Estate (DRE or the division) do not include a method of prioritizing the assignment of more serious investigations over others. Complaints are initially screened by the chief investigator and assigned to investigators based on discretion, investigator workload, or resources. There is not a policy to ensure that serious cases receive priority during the initial screening and assignment of complaints. Division policies defer to individual investigators to determine the seriousness of a complaint after assignment. As a result, serious complaints may be slow to be investigated, allowing violating license holders to practice without being held accountable for years, or not at all. Additionally, it is difficult to determine if cases considered high priority are worked before others. Conversely, the Division of Professional Licensing (DOPL) has a policy that classifies complaints based on different levels of severity before assignment. This allows the division to track more serious cases after assignment.



**The DRE does not have a policy to initially screen and prioritize more serious investigations over others.**

The DRE provides a valuable service to protect the public from those who violate real estate laws. The recommendations in this chapter will further help the DRE to continue to reach its mission. We believe the inclusion of an initial prioritization policy can assist the division to better address and improve the timelines to investigate serious cases.

Our audit examined internal policies, interviewed staff, and reviewed a random sample of cases<sup>13</sup> from the DRE database and found that some cases are significantly delayed or are slow to be worked even if displaying significant public harm factors. Other less serious cases may be worked prior to more serious cases. We acknowledge that the division generally attempts to manage and complete most of its cases as quickly as possible. But we believe the division's process can be enhanced with an initial prioritization policy to ensure

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<sup>13</sup> We reviewed a random sample of twenty-six cases from cases that closed between 2021 and 2023.



that cases with the most public harm are receiving appropriate attention. Two case examples closed in 2021 highlight this issue.

### Case Example A Worked Slowly

Complaint was received August 2017 and was initially assigned 14 workdays later. This complaint was reassigned several times before work was first notated 446 workdays later in April 2019. The respondent admitted to falsifying documents and payments. The respondent received a civil penalty of \$15,000 and their license was suspended for 180 days.

### Case Example B Worked Quickly

Complaint was received January 2019 and assigned quickly before work was first notated 62 workdays later in April 2019. The respondent was advertising a property without brokerage information. The division sent a warning letter to the respondent and did not act against them for the violation.

*Source: Auditor generated from the MLO database.*

The DRE's enforcement policies state that the preferred method for investigators to note their case progress is to keep a log within the My Licensing Office database (MLO) of all the steps that are taken throughout the investigation. According to case notes within the MLO, Case Example B, appears less egregious than Case Example A. Although Case Example B was received later, an investigator notated a log of work before work was logged for Case Example A. In terms of outcomes, Case Example A resulted in a fine and the suspension of the respondent's license, while Case Example B resulted in a warning letter with no action taken. Though both cases were assigned quickly, Case Example A recorded the first log of work after an investigator assigned to Case Example B had already commenced a log of work.

The division reports that the chief investigator instructs investigators to focus efforts on more egregious cases. However, it was difficult to determine if this was occurring based on division documents and records. The division has implemented a new Salesforce database and can now prioritize cases within the system and create an expected amount of time for cases to be completed. The division first started using Salesforce in November 2022 to receive complaints and is currently working in both the MLO database and Salesforce until all cases within MLO are completed. Our examination focused on the division's historical use of the MLO database to gain insights into how the division could improve its



practices for use with the new Salesforce database. The inclusion of an initial prioritization policy could assist the division in screening cases with higher potential for public harm and better monitor investigative cases.



**Real estate divisions in other states prioritize more serious cases. For example, Arizona assigns cases immediately and every complaint receives an update within five days.**

Real estate divisions in other states prioritize more serious cases. For example, Arizona assigns cases immediately, and every complaint receives an update within five days of receipt. For minor violations, Arizona employs a strike system. First offenses receive a letter of concern and are closed right away so the division can focus on higher-priority cases. The division also created an accelerated settlement system so that second and third offenses are completed quickly. In Arizona, when a licensee causes additional

public harm beyond minor violations or continues to violate standards, the penalty increases, and appropriate action is taken.

### **Some Serious DRE Cases Are Processed Slowly or Fail to Be Completed before the Statute of Limitations**

Because DRE does not maintain a policy to prioritize complaints, some cases may go a few years before being investigated. Additionally, some cases may be at risk of going beyond the statute of limitations.<sup>14</sup> This results in the violating license holder being able to practice in the market without being held accountable for years, or not at all. We recognize that the division addresses most of its cases within the statute of limitations. However, our concern is with the lack of clear processes and case assignment policies that could delay investigations.

DRE cases are usually handled on a "first come, first serve" basis. In some instances, cases are assigned to an investigator several months after the initial complaint, when evidence may be more difficult to compile. We found examples of DRE cases that took years to be investigated and some that expired due to the statute of limitations deadline. Some of the cases that were slow to be worked exhibited significant public harm. The following example describes how DRE spent four years on a significant case, completing it just one month prior to the statute of limitations deadline.



**DRE cases can take years to be investigated and sometimes miss the statute of limitations deadline.**

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<sup>14</sup> *Utah Code* 61-2f-402 (5)(a) establishes the statute of limitations for real estate violations at four years. Disciplinary action should commence within four years of the reported complaint.



### Case Example C

Complaint was received in August of 2018, assigned in April 2019, and closed in July 2022. The respondent participated in a scheme where they had sellers transfer property to the respondent rather than face foreclosure. The sellers could rent the property until they could buy it back. However, the licensee evicted the complainants. This violation of law resulted in a three-year suspension and a \$25,000 fine.

*Source: Auditor generated from the MLO database.*

The division reports that the investigation concluded in September 2021, but that the division decided to try to settle the case rather than file a petition, pushing the case close to the statute of limitations expiration.

It appears that the consequences for violations are typically tiered based on severity. For example, the range of penalties includes (1) fines and continuing education hours, (2) license suspensions or probations, and (3) license revocations and civil penalties. In Case Example C, the division believed that the consequences for the licensee's actions were severe enough to warrant a three-year license suspension. This case not only caused an eviction and large dollar damages for the complainants, but it also was in danger of expiring with the statute of limitations. We are concerned that DRE's lack of managing the case process could have resulted in exceeding the statute of limitations.

Case Example D indicates that licensees caused significant harm, but DRE was unable to hold one respondent accountable.

### Case Example D

An unlicensed respondent conducted activities that resulted in an embezzlement of \$145,000 of owner's fees and compensation. The complaint was received in April 2019. Two years later, an investigation began in July 2021. In April 2022, the respondent agreed with the division on a stipulation. However, the division analyst was slow to complete the stipulation, and the individual passed away about one year later in early 2023. The slow prioritization and work of this case resulted in the individual not being held accountable and was near the expiration of the statute of limitations.

*Source: Auditor generated from the MLO database.*



The division notes that two other individuals with other complaints were associated with the activities found in Case Example D. The division was able to hold these two additional violators accountable for their actions in separate cases. However, the individual in the example was not held accountable and the case was at risk of expiring before the statute of limitations. The division additionally reported other cases that were not completed before the statute of limitations expired, resulting in the respondents not being held accountable for their violations.



**Arizona completes cases prior to the statute of limitations due to its prioritization methodology.**

Arizona’s real estate division completes cases well before its statute of limitations expires. Because of its prioritization methodology, precedence is given to egregious cases, and brokerages that could pose significant harm to the public are audited proactively. We believe that DRE’s lack of a prioritization policy

to identify serious cases affects the division’s ability to hold some licensees accountable and protect the public before the statute of limitations deadline.

### **Complaints Are Not Being Screened in the Time Period Established in Policy, Resulting in a Large Backlog**

DRE has a backlog<sup>15</sup> of around five months of complaints that are not currently being investigated. The chief investigator reports that the division delays screening complaints to give investigators a manageable caseload. However, current policies state that complaints should be screened within seven days of receipt, with exceptions for unusual circumstances. This may not be possible based on the large backlog and the workload of the individual screening cases.<sup>16</sup>



**DRE has a backlog or around five months of complaints that are not currently being investigated.**

At the end of fiscal year 2023, the DRE had a total of 566 opened cases with a backlog of 163 cases<sup>17</sup> that have not been screened or assigned. Although the number of complaints received by the division has declined over the last few years the division experienced a large increase in 2023. Figure 3.1 shows that complaints declined significantly between fiscal years 2019 and 2020, yet the volume of open cases remained relatively stable until an increase in complaints in fiscal year 2023.

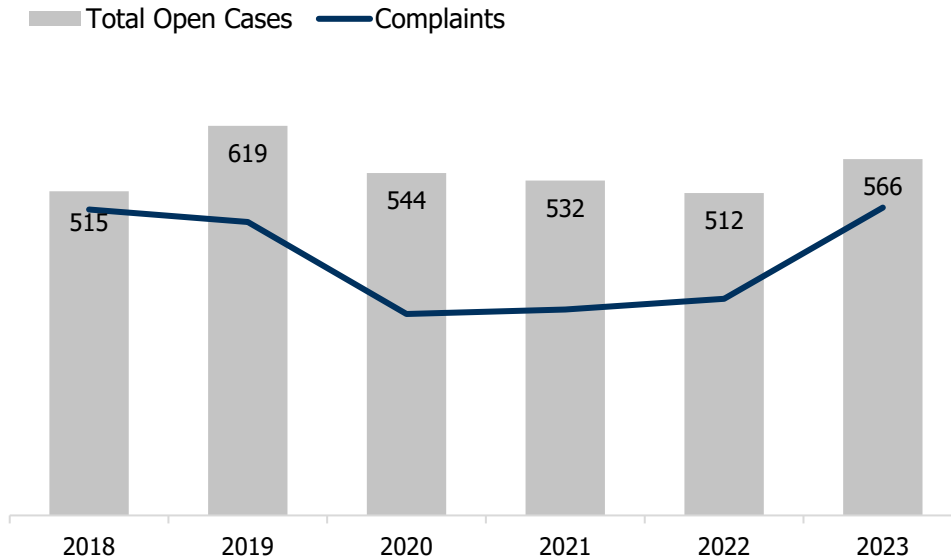
<sup>15</sup> Backlog means cases that have not been screened or assigned to an investigator.

<sup>16</sup> More information on DRE’s organizational structure and internal procedures is found in section 3.2 of this chapter.

<sup>17</sup> Report was generated in May of 2023.



**Figure 3.1. DRE’s Caseload Remained Stable Despite a Decline in Complaints in Recent Years.** DRE saw a decline in complaints between fiscal years 2019 and 2020, but the number of open cases also declined during the same period. The number of open cases remained relatively stable between 2020 and 2023, but the division saw a significant increase in complaints for fiscal year 2023.



*Source: Department of Commerce Annual Reports 2018-2022, Division of Real Estate FY 2023 data.*

Despite having fewer complaints between fiscal years 2020 and 2022, the division’s caseload remained relatively stable. As noted, the division saw a large increase of complaints for fiscal year 2023, which will likely increase its caseload. It should be mentioned that the division has also increased the number of closed cases to 485 in 2023. This is more than almost every year in the past five years. We acknowledge that the division has attempted to close more cases in recent years to help with the backlog.

However, the internal practices of the division can be improved to reduce the backlog further. The concern is that the chief investigator function creates a process bottleneck.

The chief investigator has a substantial responsibility to screen hundreds of incoming complaints and manage ongoing cases, contributing to slower case closures. Additionally, with the volume of open cases, the number of investigators, and the large backlog of unassigned complaints, we believe that the policy of reviewing cases within seven days may be unattainable.

Consequently, complaints of egregious violations may remain in the backlog without being prioritized.

We believe there are two steps to remedying these issues: (1) improvements need to be made to DRE’s policies and procedures, and (2) the division needs to



**The division has attempted to close more cases in recent years to help with the backlog. They have closed 485 cases in 2023. This is more than almost every year in the past five years.**



examine the organizational structure and internal practices, which are detailed in finding 3.2. These improvements could be the first step to remedy the backlog of work and move DRE toward screening complaints quicker, completing cases more efficiently, and providing a basis for closing cases without the need for an investigation.

#### RECOMMENDATION 3.1

The Division of Real Estate should update its policies and procedures to include criteria to prioritize cases based on severity during the screening process.

### 3.2 The Division's Investigative Process Can Improve to be More Efficient and Result Driven



**DRE's investigative process could be improved to better manage cases before the statute of limitations expires.**

DRE's investigative process contains inefficiencies that could be improved for better case management. On average, it took 509 days for a case to be closed in 2022.<sup>18</sup> DRE's written performance goals detail that investigations should be completed one year prior to the date of the statute of limitations expiration. This allows investigations to go on for three years before

action is taken. The division reports that it has a long-term objective to complete investigations of cases within one year of receipt. We found that real estate divisions in other states are able to meet their goals and close cases quicker than what is seen in Utah. For example, Colorado's goals are to have cases completed within 240 days, and more than 90 percent of their cases meet that deadline. Arizona generally has cases that last thirty to ninety days, and larger cases usually last around six months (182 days). We suggest the division continue to explore opportunities to close cases quicker and reduce the backlog. The extensive amount of time that DRE cases remain open appears to be the outcome of the inefficient investigative process in the division.

The division reports that more resources are needed to reduce the DRE caseload and support timely case completion. DRE currently employs eleven investigators. The chief investigator reports that their caseload goal is to have approximately thirty cases per investigator. Given the current number of cases open (see Figure 3.1) and the number of staff available, DRE has many cases that are not being worked.

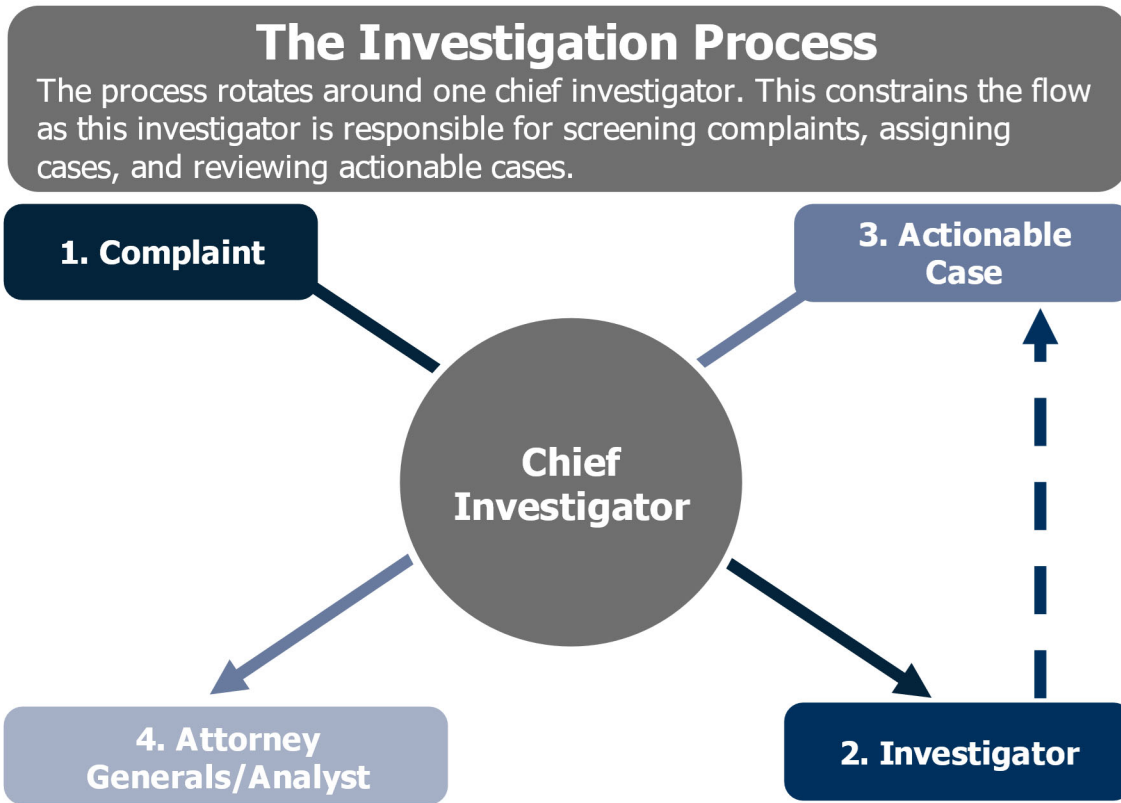
<sup>18</sup> The 509 days includes the time DRE investigators and the Attorney General's Office had the case.



Understandably, direct comparisons with other state real estate divisions are hard to make for a variety of reasons. However, to provide some context, Colorado maintains a staff of fifteen real estate investigators and five auditors. Due to employment challenges, Arizona currently has three investigators and two auditors within their division, though they have the capacity to employ more. Arizona utilizes their prioritization methods to focus on investigating and closing the most egregious cases. While we recognize that procedures and staffing differ in these two neighboring states, we highlight their goals to complete cases in a timely manner to reduce the risk of expiring before the statute of limitations. We suggest DRE continue to consider internal goals to complete cases quicker to reduce this risk. Though more staff resources could assist DRE in decreasing the time to complete cases, we believe improvements to the investigative process could assist DRE to complete cases more quickly.

### **Timely Case Completion Is Over-Reliant on One Individual Who Manages Multiple Responsibilities in the Investigative Process**

The chief investigator manages multiple responsibilities resulting in a slowdown within the investigative process. The many responsibilities of the chief investigator hinder the division's ability to execute investigations more quickly. More specifically, the chief investigator oversees the large tasks of screening all incoming complaints and reviewing the casework after investigations. The volume of work in each of these steps appears to result in slow case completion. The following graphic illustrates how the current system creates a limit on the number of cases that can be processed.



Source: Auditor generated.

Because the process relies heavily on one individual, cases are slow to reach investigators after the division receives a complaint. The process can be further delayed as the chief investigator needs to coordinate actionable cases with analysts and attorney generals who draft legal stipulations after an investigation is complete. We believe that internal procedures incorporated by division management have made this process inefficient.

As mentioned in Chapter 2 of this report, the *Best Practices Handbook* that was recently released by our office details methods for improving current practices in an organization. We recommend that following the management cycle, as shown on page 34 of this report, could help DRE to evaluate its processes and implement its vision.

As a result of our audit work with the division, DRE has started the process of improving the situation. The division director reports that they have started the process of restructuring the enforcement area so that duties can be split between the chief investigator and an additional manager. The division also is proposing hiring an additional analyst



**Following the management cycle, as shown on page 34 of this report, could better help the DRE to evaluate their processes and implement its vision.**



to assist in drafting stipulations. Both actions are meant to reduce the current burden of the chief investigator and make the process more efficient.

**RECOMMENDATION 3.2**

The Division of Real Estate should review its organizational structure and internal procedures for a more efficient investigative process.



### BACKGROUND

The Division of Securities is housed within the Department of Commerce. The division is charged with protecting the public by auditing licensed firms and agents, as well as investigating potentially fraudulent unlicensed activities.

#### **FINDING 4.1**

Division Policies Do Not Include a Written Policy to Prioritize Complaints Based on Severity, Resulting in a Lack of Clarity Over How Complaints Are Assigned

#### **RECOMMENDATION 4.1**

The Division of Securities should finalize the prioritization standards in policy to screen complaints on the newly established practice of ranking them based on public harm factors.

#### **FINDING 4.2**

The Prior Securities Caseload Management Database Lacks Information Required by Internal Policy

#### **RECOMMENDATION 4.2**

The Division of Securities should finalize the standard procedures for documenting case management decisions for investigations. Specifically, the division should include all pertinent notes, documents, and other necessary information in Salesforce to produce a trail of work for all investigated cases.



### CONCLUSION

The Division of Securities has made progress by implementing many of the recommendations from a 2008 audit. However, the division can further strengthen its policies and internal procedures within the enforcement section for documenting investigations. These improvements can better identify more serious complaints and enhance procedures for carrying out investigations.





## **Chapter 4**

# **The Division of Securities Has Made Progress Since a 2008 Legislative Audit, but More Improvements Are Necessary**

### **4.1 Division Policies Do Not Include a Written Policy to Prioritize Complaints Based on Severity, Resulting in a Lack of Clarity Over How Complaints Are Assigned**

We found that the Division of Securities (Securities) does not have a written policy to prioritize more serious enforcement complaints. Without a clear assessment of potential public harm, it is unclear why some complaints are assigned to an investigator before others. As such, it is possible that complaints exhibiting more public harm are assigned later than complaints that are less serious. The division notes that it maintains flexibility to assign cases based on resources or investigator experience. For example, some cases exhibiting less severe harm factors may be assigned to new investigators rather than a complex investigation.

However, a review of the division's records found unclear documentation and records detailing why some complaints were assigned to investigators before others. This lack of information made it challenging to determine if egregious complaints were given priority status even if received after less serious complaints.

We reviewed division policy, conducted staff interviews, and examined active and closed complaints for 2022 in the division's database. For example, Figure 4.1 shows two complaints assigned in 2022. The information for these two cases details various public harm factors. However, it does not clearly show the reasoning for why one complaint was assigned prior to the other. This information was found in the division's long-used database and a newly implemented case management tool.<sup>19</sup>

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<sup>19</sup> More information on the division's long-used database and the newly implemented management tool is found in the following sections.



## Opened February 2022

### Case Example A

The severity of this complaint is unclear as records do not list alleged dollar amount damages. A date for the statute of limitations is not listed, so it is also unknown if the case is nearing expiration. An investigator was assigned the month the case was opened. This case is an active investigation as of August 2023, although case details are limited.

## Opened May 2022

### Case Example B

Initial records state that this case had alleged damages of approximately \$450,000 between two different actions. Later records indicate \$18 million in damages with vulnerable adults as victims of the complaint. Although the case was opened in May 2022, an investigator was not assigned until September 2022. The case was later upgraded from medium to high priority in August 2023.

*Source: Auditor generated, from cases in the STRES database.*

These two examples display an instance where it appears that a more severe case was prioritized after what appears to be a less serious case. Without proper documentation and records, it is unclear why some cases are assigned and worked before others. It should be noted that the division reports that not all harm factors are present in initial complaints. For example, dollar amount damages may not exist early in an investigation. Additionally, new investigators may not be assigned to complex cases. The division states that the ability to adjust resources as new information is discovered is an important factor in Securities investigations. However, our concern is that the division is not adequately documenting the reasoning behind how cases are assigned. Properly documenting these decisions can assist the division to monitor cases that exhibit larger public harm factors.

Securities is tasked with auditing licensed securities actions (compliance) and investigating cases of unlicensed securities actions potentially relating to fraudulent activities (enforcement). The division's functions are summarized below.

**Compliance** – This includes routine examinations pertaining to the operations of licensed broker-dealers, investment advisers, and their agents. If misconduct is found, the division works with the licensed individual or firm to bring them into compliance.

**Enforcement** – The division identifies investment offerings that are fraudulent or otherwise fail to comply with the laws' requirements. This is done to



promote a legitimate market by investigating the loss of monies to fraudulent schemes.

Securities initiates compliance audits on a rotating schedule for licensed firms and dealers. Most complaints received by the division are related to unlicensed activities and are referred to the enforcement section. Our audit focuses on the receipt of a complaint and the subsequent investigation of unlicensed activities by the division's enforcement function.



**The division reports that the enforcement section's chief of enforcement has historically used discretion on which complaints should be prioritized for investigation.**

Securities reports that the enforcement section's chief of enforcement has historically used discretion regarding which complaints should be prioritized for investigation — often considering the statute of limitations first.<sup>20</sup> Cases also were placed higher on the list based on internal discussions regarding their severity or when the complaint was received.

While factors such as the chief of enforcement's discretion, internal discussions on severity, and the timing of the complaint possibly assisted the division to identify more serious complaints, our review of division records could not definitively determine if serious cases were prioritized over others. The inclusion of a prioritization policy could assist the division to identify cases displaying public harm factors early and adjust as new information becomes available.

Importantly, the division appointed a new chief of enforcement during this audit. The new chief is working on improvements for the division, including a clearer standard for prioritizing complaints. Other improvements underway are described in the following section.

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<sup>20</sup> *Utah Code* 61-1-21.1 establishes the statute of limitations for securities actions at five years, though an administrative action can be filed within ten years. The division noted that it would prioritize cases that were nearing the statute of limitations.



## A Past Audit Conducted by Our Office Recommended That the Division Establish Clear Enforcement Policies and Procedures

A 2008 audit conducted by our office found that the Division of Securities did not have internal policies to guide its practices. The lack of policies led to undefined roles of the enforcement staff and the absence of internal controls to enforce securities law. After the 2008 audit, the division created and maintained internal policies, with a recent update in 2021. However, we believe policies could be enhanced with the inclusion of a written prioritization policy to review initial complaints while maintaining flexibility to assign cases based on resources and investigator experience.



**Texas has an administrative rule that considers multiple factors when screening the severity of complaints before investigation.**

For example, Texas has an administrative rule that considers multiple factors when screening the severity of securities complaints before investigation. It establishes factors such as the ongoing nature of the complaint, how the alleged conduct relates to seniors and vulnerable victims, and the amount of financial harm presented.

The division’s new chief of enforcement, after being appointed in April 2023, created a list of public harm factors to consider when screening initial complaints. These factors weigh the impact of different areas of potential public harm areas. These include possible senior citizen harm, the dollar amount considered, and whether the complaint involves multiple victims. A complaint receives a higher priority if several of these factors are identified. The new chief notes that this new procedure is meant to focus resources on the most serious cases and mitigate public harm.

This list of factors originally was created as a paper ticket that was attached to a complaint. The new chief of enforcement is currently drafting a policy to include these factors in the division’s policies to screen and prioritize initial complaints. The list can be seen on the right.

<b>Priority Scale</b>	
	Senior Citizen
	Enhancing Factors
	Dollar Figure
	Multiple Victims
	SOL
	Active or Ongoing
	Other Factors



## Some Enforcement Cases Are on Hold Due to a Lack of Division Resources

The division has a backlog of roughly 44 cases waiting to be assigned to an investigator.<sup>21</sup> The chief reports that this equates to a workload of approximately three full-time investigators.<sup>22</sup>



**Securities has experienced high turnover in recent years. A DHRM analysis improved pay ranges to attract and keep investigators.**

Part of this backlog is due to high turnover rates in recent years. Turnover peaked at 33 percent in fiscal year 2020 and remained high at 26 percent in fiscal year 2021. The division reported that job offers were being declined due to low salaries, longer than average time to fill positions, and less-qualified applicants than desired. The division director also noted that this impacted their ability to conduct investigations because cases would be passed off to

new investigators who have little experience. To remedy this problem, the Division of Human Resource Management (DHRM) conducted an analysis of the division. It found that the salary for an investigator in Securities was approximately 21 percent below the median salary for similar job titles. Following the DHRM analysis, the division was approved to adjust pay ranges to attract and keep investigators. Securities reported that this has significantly helped address turnover issues. Even so, the division reports that it will likely take time to recover and manage the caseload to reduce the backlog of unassigned cases.

### RECOMMENDATION 4.1

The Division of Securities should finalize the prioritization standards in policy to screen complaints based on the newly established practice of ranking them based on public harm factors.

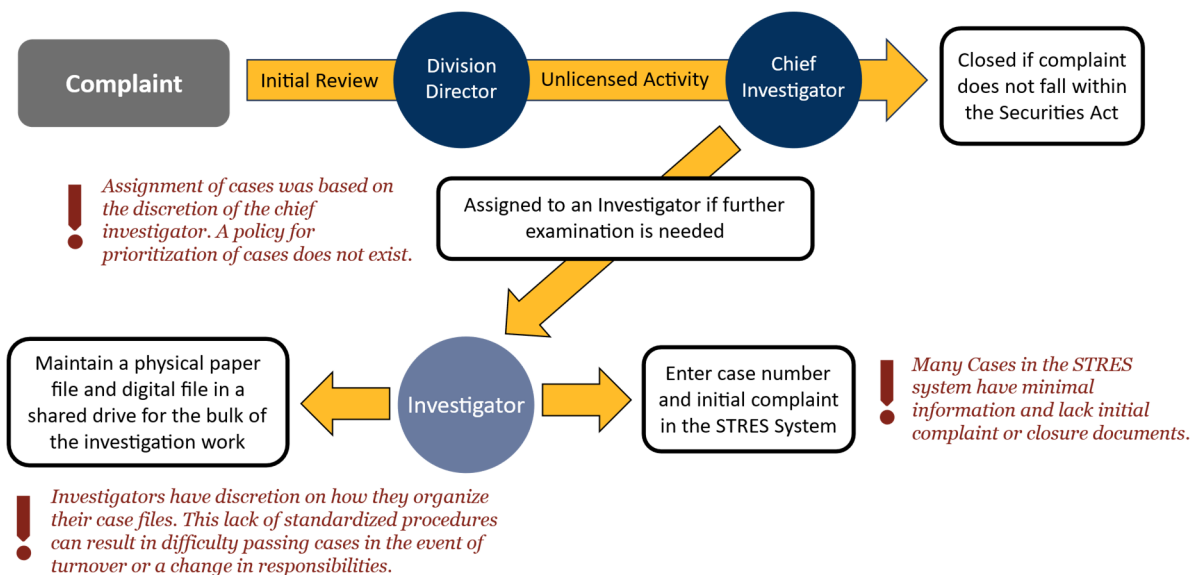
<sup>21</sup> As of August 21, 2023.

<sup>22</sup> The chief of enforcement reports that each investigator can manage an average of about nine to twelve cases per year. With 44 cases waiting to be assigned, the division would need approximately three or more investigators to manage the current workload.



## 4.2 The Prior Securities Caseload Management Database Lacks Information Required by Internal Policy

Our audit process found additional risk areas in the division’s investigative process that occurs after the initial screening of complaints. For instance, once a complaint is assigned, each investigator uses discretion to organize their case files. Additionally, key documents were not being consistently uploaded into the division’s previously used database, as required by policy. Many of these internal practices were maintained by the previous chief of enforcement and lacked a standard procedure for documenting investigations. The unorganized nature of the investigative trail has resulted in disordered documentation in the database and difficulties passing partially worked investigations to new investigators. The figure below shows the process flow of investigations and indicates risk areas that could be improved.



Source: Auditor generated.

### The 2008 Audit Recommended Standardizing Information Entered into the Database—An Area That Still Needs Improvement

Our 2008 audit recommended that the division establish procedures to better manage case files. Specifically, the audit recommended standardizing information entered into the database, as the reliability of the data was questionable. However, in this current audit, we found that a lack of standardized information is still present in the previously used database. This



database, the Securities Transactions, Registrations, and Enforcement System (STRES), had been utilized by the division for many years.<sup>23</sup>

Division policies, which were updated in 2021, designate STRES as the division's internal database to organize enforcement documentation. Yet, we found that basic documentation required by policy to be in the database was not consistently found. For example, policy requires initial complaint documents for investigations to be entered into the STRES database. However, in a review of the 18 cases closed by the division in 2022, we found only one that contained a complaint document. Additionally, the policy states that STRES should contain a closure memo when an investigation is closed. This is more common, with 12 of the 18 cases containing a closure document in the database. The division reports that not all cases may require a closure document. For example, if a complaint is not within the jurisdiction of the division, it may be closed without an accompanying document in the database. However, policy states that closure documents should be included in each case. It was unclear which cases would not be required to have a closure document.



**In a review of the 18 cases closed by the division in 2022, we found only one contained a complaint document in the database.**

Division policy also requires that STRES should contain any changes to case status. However, we found varied and inconsistent comments or updates for investigative cases in the database. Some cases contained very few comments or updates. For example, the database contains a comment section where case information can be added, a section for alleged dollar amount damages, and a section to input the expiration date for a statute of limitations. However, the information entered in these sections varied widely across cases and provided little insight into an investigation.

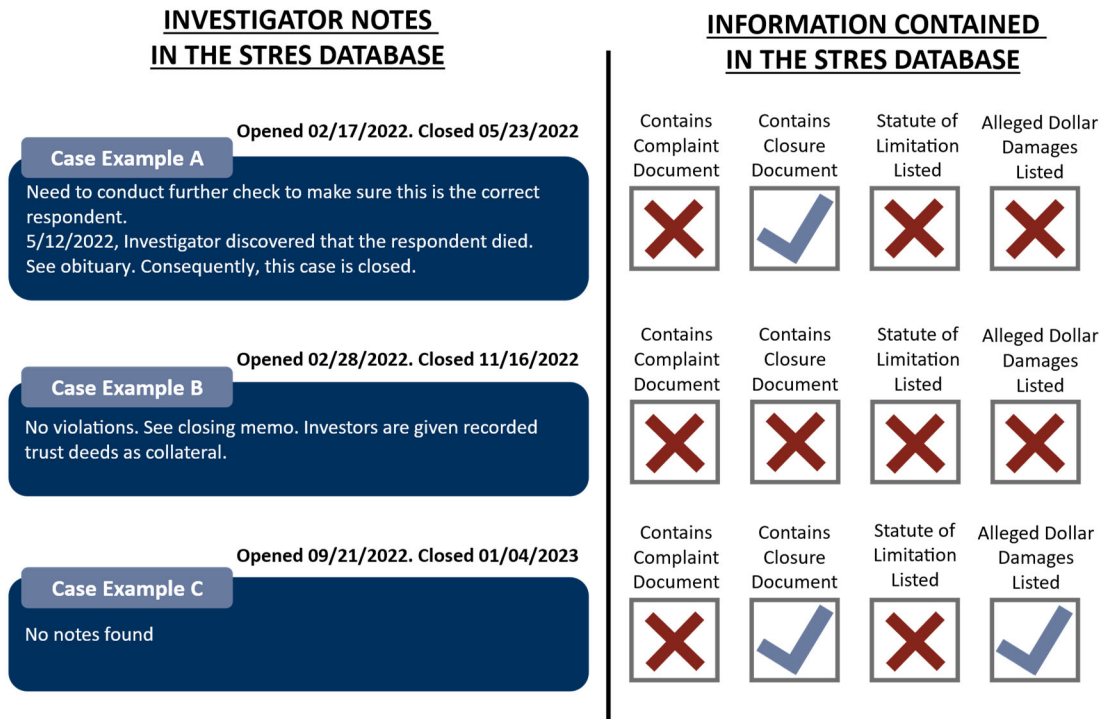
The division reports that STRES was rarely used during investigations due to its limitations in holding all casework documents. Rather, all casework notes and actions are found in a shared drive containing folders for the individual investigations. We question the purpose of the division's policy that requires both complaint and closure documents and case updates to be included in the STRES database, since this policy has not been consistently followed. The lack of standardized information, documentation, and updates made it difficult to track the details of investigative cases.

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<sup>23</sup> The division reports that the STRES database was used from the late 1990s until the recent move to Salesforce in early 2023. STRES was moved to an online platform in 2016.



For example, the following figure shows a sample of three closed cases in 2022 and 2023. The dark blue boxes display the information the investigators entered for each case summary within the STRES database. To the right is a summary of the information found in the database, indicating that the required complaint and closure documents are not consistently entered in the database.



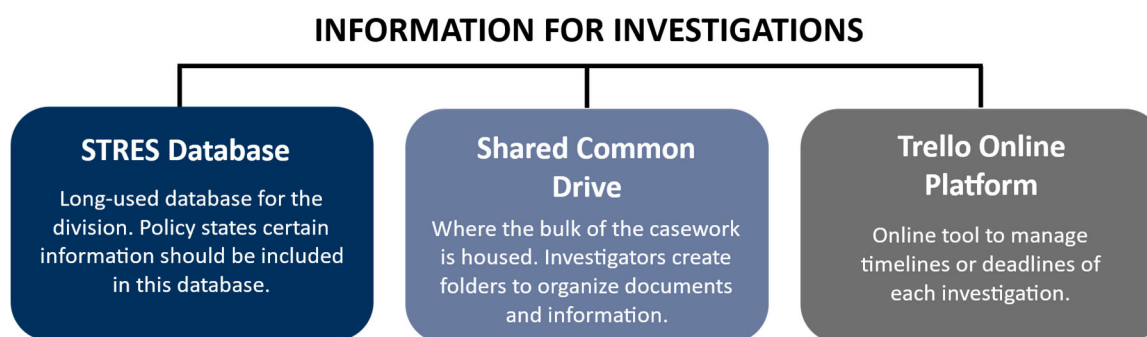
Source: Auditor generated, from cases in the STRES database.

The division recently began using the Salesforce database in late February 2023 and will no longer be using the STRES database. Still, our examination focused on examining the division's historical use of the STRES database to gain insights into how the division could improve its practices for use with the new Salesforce database. The practices of the previous chief of enforcement lacked standards to ensure that basic documentation was included in the previously used database. It is encouraging to see the newly appointed chief of enforcement consider standardizing procedures to ensure investigative consistency. With the recent shift to Salesforce, we recommend that the division establish standard procedures for required information in the Salesforce database and ensure consistent implementation of these practices.



## Details for Investigative Cases Are Found in a Shared Drive and Paper Files, Not in the Previously Used Database

Until recently, investigative documentation and information were spread among three different platforms: the STRES database, a shared drive, and Trello—a cloud-based project management tool. The figure below details the three different sources for investigative information.



*Source: Auditor generated.*

Although Securities utilized STRES for many years, the database contains inconsistent and limited case information. It was reported that STRES does not have the capacity to house supporting documents for investigations. The bulk of the casework and documentation is found in a shared drive and paper files. Each investigator has discretion to organize their individual case folders within this drive. The division used the online Trello platform to manage timelines for each investigation. This use of different platforms appears to be a practice utilized by the previous chief of enforcement to document casework outside of the limited database.

Using multiple platforms to house information, along with individualized investigative practices, resulted in difficulties passing partially worked cases to new investigators. More specifically, in years where turnover was high, incoming investigators had difficulty understanding investigative procedures that lacked detailed information in STRES and used different information platforms and individualized practices for investigations. Consequently, inefficiencies likely exist, as some cases may take longer to work because new investigators spend more time getting acquainted with an investigation.



**We believe this is an ideal time to standardize procedures and maintain consistent records within the new system to maintain an investigative trail.**

Again, the division transitioned to the Salesforce database system in February 2023. It is reported that Salesforce can house all pertinent documentation for investigative casework, so that all necessary information is housed in one place. Additionally, the new chief of enforcement has created a standardized investigative process that will reportedly be formalized in internal policies. With the implementation of Salesforce, we believe this is an

ideal time to standardize procedures and maintain consistent records within the new system to maintain an investigative trail. Maintaining a standard investigative process and trail can improve the process for new investigators or cases being transferred between investigators.

#### **RECOMMENDATION 4.2**

The Division of Securities should finalize the standard procedures for documenting case management decisions for investigations. Specifically, the division should include all pertinent notes, documents, and other necessary information in Salesforce to produce a trail of work for all investigated cases.



# Complete List of Audit Recommendations





## Complete List of Audit Recommendations

This report made the following ten recommendations. The numbering convention assigned to each recommendation consists of its chapter followed by a period and recommendation number within that chapter.

### **Recommendation 1.1**

We recommend that the Division of Professional Licensing ensure that policies and practices encourage timely intervention to stop the practice of probationers who present high risk to the public due to continued noncompliance while on probation.

### **Recommendation 1.2**

We recommend that the Division of Professional Licensing establish standards, rubrics, or matrices for bureau managers to intervene quickly and fairly to a noncompliant license holder on probation and to ensure consistent responses to different violations.

### **Recommendation 1.3**

We recommend that the Division of Professional Licensing enhance policies and standards to provide a framework for the bureau managers and individual licensing boards to maintain consistency in enforcement outcomes and compliance with probationary orders.

### **Recommendation 2.1**

We recommend that the Utah Professionals Health Program and Division of Professional Licensing should establish procedures to fully assess referrals to the Utah Professionals Health Program to ensure no public harm occurred consistent with the new policy.

### **Recommendation 2.2**

We recommend that the Utah Professionals Health Program should evaluate and modify policies to establish frameworks that include tiered interventions to assist in making decisions for participant noncompliance to enhance consistency and protect the public.

### **Recommendation 2.3**

We recommend that the Utah Professionals Health Program and Division of Professional Licensing should continue to enhance oversight and internal evaluation to ensure the program meets its purpose and staff are performing compliance tasks in line with best practices.

### **Recommendation 3.1**

We recommend that Division of Real Estate update its policies and procedures to include criteria to prioritize cases based on severity during the screening process.

### **Recommendation 3.2**

We recommend that the Division of Real Estate review its organizational structure and internal procedures for a more efficient investigative process.

### **Recommendation 4.1**

We recommend that the Division of Securities finalize the prioritization standards in policy to screen complaints based on the newly established practice of ranking them based on public harm factors.

## **Recommendation 4.2**

We recommend that the Division of Securities finalize the standard procedures for documenting case management decisions for investigations. Specifically, the division should include all pertinent notes, documents, and other necessary information in Salesforce to produce a trail of work for all investigated cases.



# Appendices

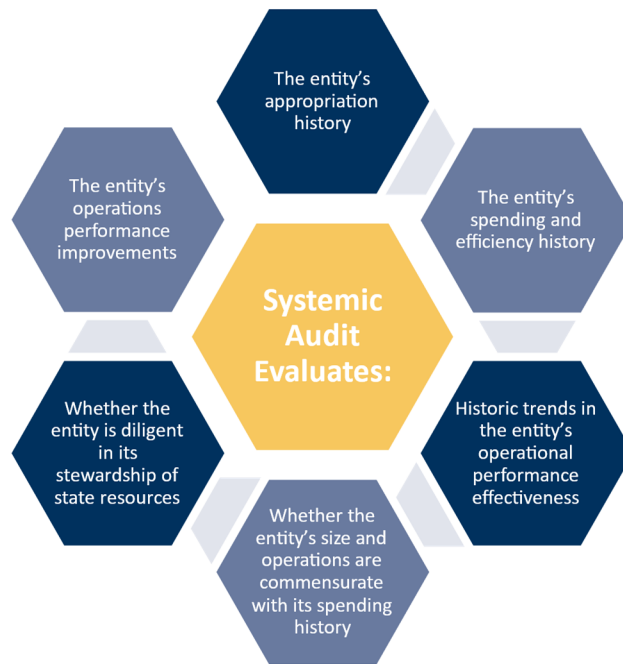


## **A. Systemic Review of The Budget of The Department of Commerce**



## Systemic Review of the Budget of The Department of Commerce

*Utah Code* 36-12-15.1 states that the Office of the Legislative Auditor General may conduct an annual performance audit of an executive branch entity or local education entity. In the 2023 Legislative General Session, statutory language was modified to rename the audits performed under this section as “systemic performance audits” rather than “in-depth budget reviews.” This change is meant to provide recommendations to the Legislature beyond budget issues. However, statutory language remains that the office “shall, as is appropriate for each individual audit: evaluate the extent to which the entity has efficiently and effectively used the appropriation...” The statutory requirements of these audits are summarized in the figure below.



*Source: Auditor generated from **Utah Code** 36-12-15.1.*

The Office of the Legislative Fiscal Analyst (LFA) conducted a large-scale accountable budget review of the Department of Commerce during the 2022 Interim. Our office did an additional examination of the budget organization of the Department of Commerce, the various revenue funds associated with the agency, and expenditures for the individual divisions. To avoid a redundant budget examination following LFA’s recent analysis, our review focuses only on several areas of interest.

## Two Divisions within the Department of Commerce Have Significantly Higher Revenue Collections Compared with Allocations

The Department of Commerce is unique in that it is a revenue-generating agency. Divisions such as the Division of Professional Licensing, the Division of Real Estate, the Division of Securities, and the Division of Corporations collect licensing and registration fees, issue fines, and collect other forms of revenue. All fees collected by the department are deposited into the restricted Commerce Service Account. All funds exceeding \$1,000,000 at the end of the fiscal year transfer into the General Fund.

While most of Commerce's divisions appear to be somewhat in line with revenue collected compared with allocated funds<sup>24</sup>, two divisions collect significantly more revenue than what they are appropriated: the Division of Securities and the Division of Corporations. The following summary shows the appropriations and revenue for these two divisions in fiscal year 2022.

<b>SECURITIES</b>	Appropriation <b>\$2,483,900</b>	Revenue <b>\$16,011,498</b>
<b>CORPORATIONS</b>	Appropriation <b>\$2,824,400</b>	Revenue <b>\$15,518,209</b>

*Source: Auditor generated from financial data provided by the Department of Commerce.*

The two divisions report that the high revenue collection is due to the volume of license applications and the fee schedule. For instance, the Division of Corporation's primary purpose is to process the registration of thousands of applications related to business, nonprofit, and other activities. The Division of Corporations experienced an increase in revenue from \$11.5 million to \$15.5 million between 2018 and 2022. The Division of Securities<sup>25</sup> also saw an increase in revenue with a collection of \$13.3 million in 2018 to \$16 million in 2022.

This revenue growth occurred while the funds allocated to the divisions remained relatively stable. The Division of Corporations was allocated \$2.4

<sup>24</sup> Commerce administration receives a large appropriation for department and program management but does not generate revenue.

<sup>25</sup> Specific audit findings regarding the Division of Securities are found in Chapter 4 of this report.

million in 2018, which grew slightly to \$2.8 million in 2022. Securities had a \$2.1 million allocation in 2018 that increased to \$2.5 million in 2022.

### **Commerce Worked with the Legislature to Reduce Fees by \$5.3 Million and Increase Appropriations in Some Areas**

The Department of Commerce is aware of the large revenue collection by these two divisions. Commerce and the Legislature have worked together to take initial steps to address the revenue overcollection. The department analyzed individual licensing fees and registrations in the divisions to determine if they could be reduced to benefit licensees. As a result, some licensing fees were reduced by an average of 40 percent in Securities and an average of 22 percent in Corporations. The graphic below shows the reductions in each of the divisions.

#### **THE DIVISION OF SECURITIES**

<b>License</b>	<b>Previous Fee</b>	<b>New Fee</b>	<b>Percentage Change</b>
Broker-Dealer Agent	\$60	\$40	-33%
Broker Dealer Firm	\$200	\$130	-35%
Investment Advisor	\$100	\$40	-60%
Investment Advisor Representative	\$50	\$30	-40%
Federal Covered Advisors	\$100	\$70	-30%
<b>Average: 40% reduction</b>			

#### **THE DIVISION OF CORPORATIONS**

<b>Registration</b>	<b>Previous Fee</b>	<b>New Fee</b>	<b>Percentage Change</b>
LLC Application	\$70	\$54	-23%
LLC Renewal	\$15	\$13	-13%
DBA* Renewal	\$22	\$13	-41%
For Profit Application	\$70	\$54	-23%
For Profit Renewal	\$20	\$18	-10%
<b>Average: 22% reduction</b>			

\*DBA, or Doing Business As, may be an owned entity that wishes to transact business under an assumed name. While the DBA renewal fee was reduced, the initial DBA application was not reduced and remains at \$22. A DBA is renewed every three years.

Source: LFA Department of Commerce Accountable Budget Review.

LFA predicts that these changes will result in a revenue reduction of approximately \$5.3 million (\$3,680,105 in license revenue for Securities and \$1,661,246 for Corporations) based on the volume of the licenses.

Additionally, the department worked with the Legislature to increase appropriations for fiscal year 2023 to improve services. Specifically, it requested funding to begin upgrading aging technology such as the Division of Corporation’s outdated One Stop Business Registration program. This upgrade will assist the hundreds of thousands of businesses that utilize the system. Additionally, the department reports that many divisions replaced aging systems by moving to the Salesforce software program in February 2023 to better manage workload.

### **A Sample of Licensing Fees in the Two Largest Revenue-Generating Divisions Show that Utah is Generally in Line with Nearby States**

We conducted a partial analysis of licensing and registration fees by collecting a small sample from neighboring states to determine if the fee amounts were contributing to the large revenue collection in the Securities and Corporations divisions. We found that following the recent fee reductions, Utah’s fees are generally in line with or lower than those of neighboring states. The following graphic shows a comparison of fee ranges of nearby states.

#### **THE DIVISION OF SECURITIES**

<b>License</b>	<b>Utah</b>	<b>Arizona</b>	<b>Colorado</b>	<b>Idaho</b>	<b>Nevada</b>
Broker Dealer Agent	\$40*	\$45	\$16	\$50	\$125
Broker Dealer Firm	\$130*	\$300	\$59	\$200	\$300
Investment Advisor	\$40*	\$40	\$59	\$30	\$110

#### **THE DIVISION OF CORPORATIONS**

<b>Registration</b>	<b>Utah</b>	<b>Arizona</b>	<b>Colorado</b>	<b>Idaho</b>	<b>Nevada</b>
For Profit Application	\$54*	\$60	\$50	\$100	Tiered (\$75-\$375)
Nonprofit Application	\$30	\$40	\$50	\$30	\$50
LLC	\$54*	\$50	\$50	\$100	\$75

\*Recently reduced fees.

Source: Auditor generated from state fee data.

The Department of Commerce is actively seeking to reduce licensing and registration fees in these divisions to help level revenue collection and reduce the

burden on licensees and corporate entities. Additionally, the department is upgrading aging systems to assist internal processes and make it easier for outside users to apply for licenses and registrations. We encourage the Department of Commerce to continue to examine its unique budget to further enhance the services of the divisions to serve the public.



**B. It is Unclear Whether the  
Prelitigation Medical Malpractice Panel  
Is Meeting Its Purpose**



## **Existing Data Are Insufficient to Determine If the Malpractice Panel is Reducing Lawsuits**

We conducted a review of several divisions and programs as part of this systemic performance audit of the Department of Commerce. While this report does not include findings of all the areas we reviewed, we include this appendix on medical malpractice panels to highlight an area that the Legislature may wish to study further. Specifically, we found that there is a lack of data to show whether the panel is meeting its purpose. Because of this, we do not offer a specific recommendation. Rather, we include this appendix to call attention to the unknown value of the panel based on limited data.

*Utah Code*<sup>26</sup> requires an individual wishing to bring a medical malpractice lawsuit against a healthcare provider to have the case heard before a prelitigation panel made up of varied professionals. The intended purpose of this panel is to quickly evaluate malpractice claims in hopes of encouraging settlements or reducing potentially frivolous cases in the court system.

However, individuals pursuing a medical malpractice complaint can go forward in court regardless of the panel's decision. Panel decisions are nonbinding and confidential. In other words, the panel's decision on whether a case has merit would *not* be heard in subsequent court action. As such, it is unknown if the panel's work reduces the number of malpractice cases that go to court. The Division of Professional Licensing (DOPL) has difficulty tracking cases that go to court following a panel hearing. Without such data, it is difficult to determine whether the panel is meeting its intended purpose. Additionally, it was reported that some individuals wishing to pursue a malpractice claim were discouraged by the need to retain counsel and appear before the panel before being able to take legal action.

### **Appearing before the Prelitigation Panel Is Mandatory before Court Action**

Appearing before the prelitigation panel is required before any action can be taken in the court system. Each panel is unique and focuses on individual malpractice complaints. For example, if an individual is bringing a case against a nurse, the panel would include a professional in the nursing field. Likewise, if the case is brought against a surgeon, the panel would need to include a

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<sup>26</sup> *Utah Code* 78B-3-415. The medical malpractice panels are administered by DOPL.

professional surgeon to hear the case. By law, the panel is made up of at least three individuals:<sup>27</sup>

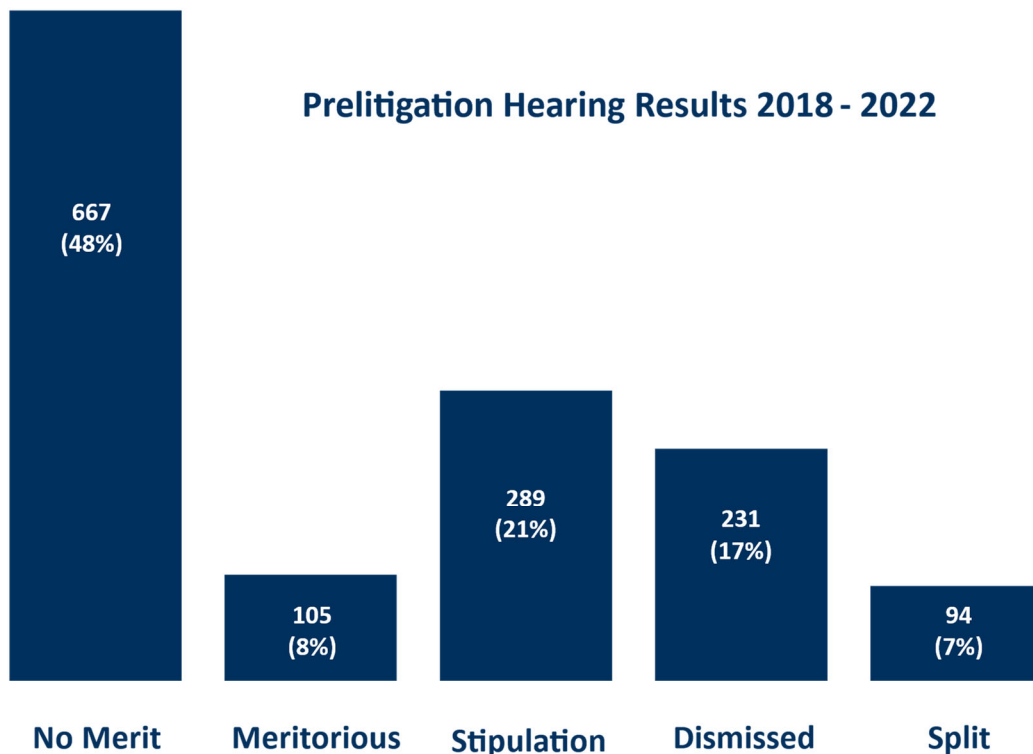
- A licensed healthcare provider who is practicing and knowledgeable in the same specialty as the defendant of the action
- A licensed lawyer in good standing to serve as chair of the panel
- A lay panelist who is not a lawyer, doctor, hospital employee, or other healthcare provider

These individuals decide whether the case has merit related to medical malpractice. On occasion, the opinions of the three panel members may be split. We found that most cases are found to be without merit; only about 8 percent of cases heard are found to have merit. Figure B shows the breakdown of 1,397 cases decided by the panel from 2018 to 2022.

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**Figure B. Prelitigation Panel Hearing Results for 1,397 Cases.** Only 8 percent of the cases heard by the medical malpractice prelitigation panel were found to have merit.

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*Source: Auditor generated, from data provided by DOPL.*

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<sup>27</sup> In cases where a hospital or its employees are named as a respondent, a hospital administrator would become a fourth member of the panel.

As seen in Figure B, panel decisions indicate that most of the malpractice complaints do not have merit. Yet, this determination has limited value, as individuals can still pursue court action and the court would not be informed of this assessment. Significantly, stipulations are seen in 21 percent of the panel hearings. A stipulation is when the parties agree that there is no useful purpose to attend a panel hearing. The individual pursuing the malpractice complaint is issued a certificate of compliance to move forward in the court system.

### Other State Medical Malpractice Panels Allow Decisions to be Heard in Court

Utah is one of fifteen states that maintain a medical malpractice prelitigation panel. However, most of the panels in other states allow the panel’s decision to be heard in court. Utah’s panel is one of only five panels nationally that maintain a confidential decision by the panel. The other states allow the panel’s decision to be heard in subsequent court action. Idaho is the only state that maintains a malpractice panel where it is unclear on whether decisions can be heard in subsequent court action. The following graphic summarizes these distinctions among different states.



Source: Auditor generated from individual state statutes.

In conclusion, it is difficult to determine if the medical malpractice panel is meeting its purpose of reducing lawsuits. Individuals can go through the court system regardless of panel decisions. Decisions of the panel are confidential and nonbinding. Without adequate data to track subsequent court cases, it is difficult to measure the success of the panel. We suggest that the Legislature consider the purpose of the medical malpractice panel to decide if it needs modification to meet its intended purpose.

For example, the following two structures could be examined further.

- If the Legislature wishes to enhance the current utility of the medical malpractice panel, it could consider allowing the panel's decision to be heard in court. Many of the states that allow panel decisions to be heard in court recognize that the opinion is not conclusive but permit the evidence to be recognized by the court.
- Conversely, the Legislature could consider whether the panel is necessary for medical malpractice cases. For example, Wyoming repealed its malpractice panel in 2022, and many states do not utilize such panels. Rather, they allow an individual to proceed to court with other requirements. For example, Arizona requires an expert opinion be filed that shows the factual basis for the claim, and any errors or omissions that could have potentially resulted in malpractice.

We recognize that further study likely will be required to determine the Legislature's desired policy for the medical malpractice panel.



# Agency Response





SPENCER J. COX  
Governor

# UTAH DEPARTMENT OF COMMERCE

MARGARET W. BUSSE  
Executive Director

JACOB HART  
Deputy Director

DEIDRE M. HENDERSON  
Lieutenant Governor

November 7, 2023

Mr. Kade Minchey, CIA, CFE  
Officer of the Legislative Auditor General  
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Salt Lake City, UT 84114  
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Dear Mr. Minchey,

We appreciated the opportunity of having your team review programs within the Department of Commerce. One of our core values at Commerce is trust, which is spurred through continuous improvement, diligence, accountability, and professionalism. Many items in the audit represent areas that we have been taking active steps to do better. As we make strides to improve, the recommendations of the audit will accelerate that growth.

We are grateful for the highly interactive process of the audit and your and your staff's willingness to engage with us regarding the audit to discuss findings and recommendations. We intend to implement all recommendations presented in the audit. Below is additional context and responses to selected recommendations found in the audit report.

## Chapter 1

- ***Recommendation 1.1: We recommend that the Division of Professional Licensing ensure that policies and practices encourage timely intervention to stop the practice of probationers who present high risk to the public due to continued noncompliance while on probation.***
- ***Recommendation 1.2: We recommend that the Division of Professional Licensing establish standards, rubrics, or matrices for bureau managers to intervene quickly and fairly to a noncompliant license holder on probation and to ensure consistent responses to different violations.***
- ***Recommendation 1.3: We recommend that the Division of Professional Licensing enhance policies and standards to provide a framework for the bureau managers and individual licensing boards to maintain consistency in enforcement outcomes and compliance with probationary orders***

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We plan to implement improvements and policies and practices to encourage timely intervention and establish rubrics for consistency in accordance with these recommendations. However, important policy considerations factor into the way we do this, including:

**a. What constitutes a timely response varies by situation and includes more than legal action**

We will implement Recommendation 1.2 regarding quick and fair intervention for noncompliant license holders. In some instances when placed on probation, employers will choose to part ways with a practitioner, or will temporarily halt employment if there are questions of a practitioner's sobriety. However, the audit identified some cases that continued employment during periods of non-compliance.

In considering steps to take to implement the audit findings, communication with employers is a tool that DOPL will continue to use in some cases outside of the formal legal process. Memoranda of Understanding for probationers allow DOPL to contact employers during relapse and discuss the relapse and ensure the employee is not working a shift when public safety may be at issue due to a recent drug test. DOPL utilizes this option to contact employers as an intermediate step to prevent public harm. Employers often observe board hearings discussing their employees' progress during probation, and are able to cancel shifts for employees during relapse.

If DOPL knows that the individual is not working, the urgency to revoke a license is not there because the individual is not causing harm in a healthcare environment. This means that effective awareness of a professional's work status, irrespective of their license status, is a critical first step to protect the public in the pendency of formal action and consulting a board regarding licensure. This would not necessarily be reflected in the timing numbers for probation cases, and will continue to be a tool utilized by DOPL going forward.

**b. Legal requirements and due process plays into what can be considered timely**

Administrative actions require adequate preparation in the filing of materials or they risk failure on quality of evidence, ineffective writing, or on procedural basis. The Administrative Procedures Act provides requirements for hearings, including an opportunity to be heard.

The audit suggests emergency hearings as a potential tool for DOPL to utilize in increasing timeliness in probation response. Emergency proceedings are not a feasible tool for frequent use by DOPL. Holding an emergency hearing requires extensive resources, from Attorney General preparation to the convening of a panel of professionals from the board with little notice, disrupting their ability to provide care. Apart from the practical resource strain created from holding emergency hearings, the nature of an emergency hearing could compromise the due process of a citizen because it results in revocation before formal process is taken.

**c. Relationship between DOPL boards and enforcement**

While we agree that we should evaluate the relationship between the board and administrative action, and provide better guidelines for their involvement, boards will continue to remain a critical component of good administrative hearings in accordance with statutory direction. Board expertise and ability to understand the sometimes complicated ethical nuances of each profession are needed in most cases to determine appropriate discipline, whether that direction is mandatory to be followed or not.

**d. Appropriate discipline for behavior can and should vary by profession**

In Section 1.3, the audit suggested creating consistency between different professions, using the example of a nursing board and physician board, but discipline can and should vary in some instances. As stated in the report, DOPL is an “umbrella” licensing agency. Multiple professions are managed within one division, sharing staff time and other resources. Most states license their professions through individual licensing boards that hire their own staff and do not share it with other professions. While some economies of scale and consistency of processes are among the benefits derived from an umbrella agency structure, individual professions are unique. Their training and scopes of practice necessitate unique considerations both at the time of licensure and when considering discipline. DOPL will continue to seek a balance between the benefits of consistency and the need for unique professional considerations.

**Chapter 2**

- ***Recommendation 2.1: We recommend that the Utah Professionals Health Program and Division of Professional Licensing should establish procedures to fully assess referrals to the Utah Professionals Health Program to ensure no public harm occurred consistent with the new policy.***
- ***Recommendation 2.2: The Utah Professionals Health Program should evaluate and modify policies to establish frameworks that include tiered interventions to assist in making decisions for participant noncompliance to enhance consistency and protect the public***
- ***Recommendation 2.3: The Utah Professionals Health Program should continue to enhance oversight and internal evaluation to ensure the program meets its purpose and staff are performing compliance tasks in line with best practices.***

**a. Legislative Direction**

The Utah State Legislature and DOPL have been working for years to find the best ways to help healthcare providers with substance use disorders to maintain their careers if they can do so safely. Since the 2012 audit, various bills addressed opioid usage and healthcare provider conduct, including the adoption of the DOPL-recommended enhancement to create the UPHP. (HB 285, 2020 general session) The UPHP and its predecessor were established as an alternative to public discipline, so long as the participants are able to continue practicing safely and not cause public harm. We appreciate the audit for asking questions that cause us to further refine this program and our definition of public harm when

considering participants in the program. Defining public harm in the world of substance use disorders has been difficult for both the Legislature and for DOPL.

Recent activity from the Utah legislature (HB 90, 2019 and SB 201, 2020) has provided substantial direction and limitations on preventing a licensee from practicing due to criminal conduct. This includes language requiring that all criminal convictions have a “substantial relationship” to the ability to safely or competently practice before revocation can be considered. This shows an intent by the legislature to provide second chances to people rather than defaulting to preventing an individual from engaging in their chosen profession. It may be possible that sentiment is shifting on this point, but DOPL has tried to be responsive to this direction in its disciplinary actions.

#### **b. Balanced assessment in pre-participation evaluations for URAP**

We agree that referrals should be fully assessed prior to entering the program, but what that assessment entails must be carefully considered. It is better for patients, employers, and healthcare workers if workers choose to enroll in UPHP instead of continuing to practice when their substance use disorder may be dangerous to patients. Voluntary participation significantly increases the likelihood that healthcare practitioners will seek assistance and avoid significant public harm. If the worker thinks that they will be part of a formal investigation or discipline, this will discourage voluntary participation and increase the likelihood that a patient will be harmed before the healthcare provider receives help. While there is no question there are certain behaviors that should not qualify for UPHP, both DOPL and UPHP must be careful to not discourage providers from coming forward.

### **Chapter 3**

- ***Recommendation 3.1: We recommend that the Division of Real Estate update its policies and procedures to include criteria to prioritize cases based on severity during the screening process.***
- ***Recommendation 3.2: We recommend that the Division of Real Estate review its organizational structure and internal procedures for a more efficient investigative process***

We agree with and plan to implement Recommendations in 3.1 and 3.2. As noted in the audit report, there is a backlog of cases at the Division of Real Estate (DRE) that should be addressed. The division has been revising its processes for some time, but resource constraints are also significantly impacting DRE’s ability to catch up on this backlog following a surge of licensees during the Covid-19 pandemic and implementing a new online complaint intake process. For multiple years, Commerce sought an additional DRE investigator through the budget process to help address some of the workload issues but has not received funding for an investigator. We feel the audit reiterates the need for this additional position, which is part of the department’s budget request for this coming fiscal year.

## Chapter 4

- ***Recommendation 4.1: We recommend that the Division of Securities finalize the prioritization standards in policy to screen complaints based on the newly established practice of ranking them based on public harm factors***
- ***Recommendation 4.1: We recommend that the Division of Securities finalize the standard procedures for documenting case management decisions for investigations. Specifically, the division should include all pertinent notes, documents, and other necessary information in Salesforce to produce a trail of work for all investigated cases.***

We concur with the direction of the recommendations for the Division of Securities. The Division will continue its work of revising current policy regarding prioritization. As noted in the audit, STRES is no longer being utilized in the division, and we look forward to improving documentation and case management using the new system.

As noted above, we accept and will comply with the recommendations in the report. The department will work to implement these changes in accordance with our mission and strategic plan.

Sincerely,



Margaret W. Busse  
Executive Director  
Utah Department of Commerce





**Office of the Legislative Auditor General**

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