Questions A Legislator Should Ask

Second Edition

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Foreword

The original edition of Questions a Legislator Should Ask is considered a classic among state policy makers. The centerpiece and certainly the most widely quoted portion of that book is the list of suggested questions that legislators can ask when confronted with a request for professional or occupational regulation.

Since Questions was first published in 1978, a number of major changes have occurred in the field of regulation. Despite that, the list of questions has remained an important tool in state houses across the country. In this newly revised edition, the initial list of questions is presented basically intact, followed by a glossary of terms and a brief, current bibliography containing additional resources for learning more about professional and occupational regulation.

I have no doubt that you will find the second edition even more useful than the first.

William L. Marcus
1993-1994 CLEAR President
March, 1994

Introduction

Licensing is a process by which a government agency grants individuals permission to engage in a specified profession or occupation upon finding that individual applicants have attained the minimal degree of competency required to ensure that the public's health, safety and welfare will be reasonably well protected.

Of the various regulatory options available to states, licensure imposes the most stringent requirements. Once a profession obtains licensure status, it is illegal for anyone who does not hold a valid license to practice that profession or occupation. In essence, when states have the power to grant licensure status to individuals, they also have the power to deny individuals the opportunity to earn a living in that profession if they fail to meet all of the initial, and continuing, licensure requirements. This is an impressive power that states possess and one that must be exercised judiciously.

The first state-level professional regulation in the United States was accomplished through Virginia's medical practice act in 1639. It was not until the late 1800's, however, that state licensure activity began in earnest, and by 1900 most states had licensed attorneys, dentists, pharmacists, physicians, and teachers. Between 1900 and 1960, most states also granted licensure to 20 additional groups, including accountants, nurses, real estate brokers,

barbers, chiropractors and funeral directors. Since that time, states have been deluged with requests for licensure by a broad range of traditional, specialty and emerging professions and occupations.

Over the years, the public has become more accustomed to and more accepting of licensing as a restriction needed to protect society from incompetents and charlatans. Proponents of licensing, particularly the individual occupational and professional associations, maintain that licensing benefits the public by assuring consumers of high-quality goods and services. Critics of licensing argue otherwise. Licensure is intended to protect the public by screening out individuals who would do harm and disciplining those who have inflicted harm. The basic question surrounding these debates is: "Who benefits most from licensing -- the public or the regulated profession?"

The following guidelines for planning or reviewing a regulatory program, originally developed through a series of regional meetings in 1975 and 1976, remain valid nearly twenty years later. These guidelines, along with the series of essential questions that should be asked, provide a basic framework for identifying ways in which professional and occupational regulation can be improved.

Guidelines for Regulation: Should States Regulate Professions and Occupations?

Regulation should meet a public need.

Requests for licensure rarely come from an outraged public seeking to end some intolerable abuse. Typically, they are made by professional and occupational associations acting on behalf of their members.

If regulation is intended to meet the needs of the public, a basic premise of regulation, the public's opinions should be heard during the legislative decision making process. Unfortunately, consumers are rarely present during legislative hearings when regulatory proposals are being considered. There are a variety of possible reasons for the public's absence: (1) being uninformed of the hearings, (2) being poorly organized, (3) assuming that their opinions would not matter, and (3) lacking the skills and resources to assemble and effectively present data showing the likely impact of regulation on their pocketbooks.

As stated previously, proponents of licensure frequently argue that regulation is needed to protect the public's health, safety, and welfare. The actual result of licensure, however, may be that the licensees are the beneficiaries of such a law. Licensed practitioners gain an exclusive right to deliver services. They may then ask the board, made up of fellow practitioners, to use its powers to restrict entry into the field by setting high education and

experience requirements, giving difficult tests, and erecting barriers to keep out practitioners from other states. Thus, the licensed group may establish monopolistic conditions that enable it to control the availability and cost of services and restrict competition by prohibiting advertising and competitive bidding. If these practices exist, they may raise costs to consumers without necessarily providing the public any additional protection.

To determine whether a professional or occupational group should be licensed, each proposed licensure program should be scrutinized carefully to determine the precise nature and seriousness of the need. There are many situations where the public needs to be protected from dangers posed by unqualified practitioners, but not every service represents a direct threat to the public even if a practitioner is unqualified.

The overriding questions that a state must answer when evaluating the need for licensing are:

(1) whether the unlicensed practice of an occupation poses a serious risk to the consumers' life, health, safety or economic well-being;

(2) whether potential users of the service can be expected to possess the knowledge needed to properly evaluate the qualifications of those offering the services; and

(3) whether benefits to the public outweigh any potential harmful effects such as a decrease in the availability of practitioners, higher costs of goods and services, or restrictions on optimum utilization of personnel.

Government should provide only the minimum level of regulation.

Even when a careful analysis of need shows there are compelling reasons to regulate a profession or occupation, it does not necessarily follow that licensure is the most appropriate mechanism for doing so. Licensure restricts the scope of practice so that it becomes illegal for unlicensed individuals to provide specific services. For this reason, licensure should be used only as the remedy of last resort.

Before legislators agree to licensure for a specific group, other regulatory approaches short of licensure should be explored. The method of regulation and the degree to which it restricts practice should bear some relationship to the seriousness of the harm that is likely to result from the absence of regulation.

In some cases, the legislative decision should be that no form of regulation is necessary because the potential harm is not great and the public is able to determine whether an individual is competent. If, however, some form of regulation is believed to be necessary, two less restrictive approaches than licensing should be considered -- registration and certification.

Registration is an appropriate form of regulation when the threat to life, health, safety, and economic well-being is relatively small and other forms of legal redress are available to the public. In its simplest form, registration requires an individual to file his or her name and address

with a designated agency. There is usually no pre-entry screening by a regulatory agency. Registration, in this form, does little more than provide a roster of practitioners. It is also possible, however, to have registration requirements that include minimum practice standards set by the agency. Thus, while registration would not be exclusionary, it would subject registrants to minimum standards and thereby provide some protection to the public.

Certification is a form of regulation that grants recognition to individuals who have met predetermined qualifications set by a state agency. Only those who meet the qualifications may legally use the designated title. Non-certified individuals may still offer similar services to the public as long as they do not describe themselves as being "certified" or use a specific title. Certification is sometimes granted by states to individuals who are also licensed, but who have demonstrated advanced, specific knowledge within the general area of practice.

There is considerable confusion surrounding the terms "registered" and "certified". Indeed, they are sometimes used interchangeably with the term "licensed". For example, "registered nurses" are actually licensed nurses because it is illegal for anyone to practice nursing unless licensed by a nursing board. "Certified Public Accountants" are actually licensed rather than certified by states. In some states, a profession or occupation may be licensed; in others, the same group may only be registered. Confusion is further compounded by the fact that many non-governmental agencies, such as professional societies, grant "certification" to those who meet predetermined qualifications, including passing an examination.

The confusion surrounding the definition and use of these terms may never be resolved partially because of the historical use of the terminology. Nevertheless, it is important for legislators to impose only the minimal level of regulation necessary to protect the public.

If an occupation or profession is to be licensed, its scope of practice should be coordinated with existing statutes to avoid fragmentation and inefficiency in the delivery of services.

Groups seeking mandatory licensing usually argue that their scope of practice must be defined broadly in order to prevent unqualified persons from engaging in any aspect of their practice. This view may indeed protect the particular profession, but it does not necessarily provide any greater protection for the public. As technology expands and new professions emerge, the public may be hindered from receiving reasonably priced, competent care because of previously worded broad scopes of practice. Accordingly, these new groups may be unable to practice even though they possess the necessary education and experience qualifications to be of service to both the public and other licensed groups.

Restrictions imposed by overly broad scope of practice statements stem, in part, from a failure to recognize that many groups within a system have overlapping functions. When a group is granted licensure based on broad scope of practice statements, certain undesirable

consequences, such as fragmentation of services, underutilization of human resources and proliferation of new professions, may result.

A field may become fragmented when many discrete specialty groups, each with its own scope of practice statements, obtain licensure. Fragmentation may be signaled when an already licensed group seeks to prevent an emerging group with specialized training from sharing the work.

Underutilization occurs when paraprofessionals, support personnel or groups which combine parts of several already regulated practices find that their utilization within the delivery system is impeded by jurisdictional conflicts and prohibitions against the delegation of functions. Requirements for licensure should be on competence and efficiency and the avoidance of exclusive allocation of functions to certain named groups.

Proliferation or pressure to license new occupational categories sometimes happens when practice restrictions of one group prevent members of another group from providing services that the latter group is qualified to provide. The group prevented from practicing is then likely to seek its own licensure law in order to gain statutory recognition that would legitimatize its activities.

Requirements and evaluation procedures for licensure should be clearly related to safe and effective practice.

Regulatory laws often appear exclusionary because they include non-competency based requirements such as age, citizenship, high license fees, and residency, that have little or no relationship to public protection. Irrelevant requirements should be eliminated.

The completion of an approved training program and certain experience requirements may be reasonable requirements depending upon the group being licensed. Yet even such requirements can become exclusionary if the time involved in training is excessive or if needless restrictions are imposed. For example, a requirement that an applicant's experience must be obtained in a specific state or only at a limited number of institutions would be difficult to justify as reasonable.

While many licensure applicants usually apply after completion of an approved program of training, the law should make allowances for those who may have acquired their competency outside a formal educational system or outside of the United States. It should also be recognized that in some instances, formal training programs do not exist. Procedures need to be developed to evaluate such individuals, not in terms of their formal training, but in terms of their demonstrated competence to perform the functions required on the job.

All pre-licensure evaluation procedures, including competency examinations and education/experience reviews, must be reasonable and fair to candidates, including those with a disability. According to the Americans with Disabilities Act, disabled candidates should have **reasonable** accommodations made so that their disability is

not a negative factor in determining their level of competency.

If an examination is required it must meet nationally recognized testing standards. It should also be designed to measure only the knowledge, skills and abilities required for entry-level competent practice. The decision to require a written, oral and/or practical examination should be based upon the job requirements. The goal of licensure examinations should not be to pass only the best, but rather to pass those who demonstrate the necessary minimal level of competence, as determined by practitioners, in order to protect the public.

Every out-of-state licensee or applicant should have fair and reasonable access to the credentialing process.

With the signing of the North American Free Trade Agreement (NAFTA), fair and reasonable access to the credentialing process is required not only for individuals licensed in other states, but also for those licensed in Canada and Mexico. As a result of this new legislation, each state's regulatory body needs to evaluate more closely the process for licensees to move into that state. Which requirements are necessary for public protection and which requirements only serve to keep licensees, even if they are competent, from moving into that state?

It is unreasonable to require licensed individuals, regardless of experience or qualifications, from one state to undergo the entire licensing process, including initial

examination, for entry into another state. Such requirements impose a hardship on qualified practitioners who have been out of school for many years because examinations used for initial entry tend to emphasize what is currently being taught in the educational system. With the passage of time, most professionals forget many of the theoretical concepts and minute details that they learned while in school, especially if those facts are seldom used in their day-to-day practice. However, as they encounter new problems and situations in the course of their practice, they acquire new knowledge and skills in order to meet these challenges competently. Thus, the test used to screen recent graduates may not be the best or the most effective way to assess the competence of those who have been out in practice for a number of years.

Under licensure by endorsement, individuals who are already licensed in one state submit their credentials for evaluation by the state to which they now wish to be licensed. Out-of-state licensure applicants who initially met requirements comparable to those required in the new state should be eligible to endorse into that state.

In order for endorsement to work and not create a burden for the applicant, states need to adopt comparable standards for entry into practice. If there are questions regarding the comparability of a required examination, the new state should evaluate the examination initially taken by the applicant to determine similarity to the one that was required by applicants at the same time.

To further assist states in assessing the comparability of examinations, a number of professions and occupations rely upon national examinations. If an applicant has

already passed an examination which is substantially equivalent to the examination given by the new state, the need for reexamination should be questioned. There may, however, be a need to examine the applicant on the law and rules specific to the new state if these have a major relationship to one's competency to practice.

States that adopt standards substantially higher than those that prevail elsewhere should be required to demonstrate that these higher standards are clearly in the public's interest and not designed to exclude qualified practitioners from entering that state. As practitioners become more mobile, states need to take a closer look at their requirements to ensure that they are not exclusionary.

At the same time, states have a responsibility to ensure that entering practitioners are not being disciplined in another state. An individual whose license has been revoked or suspended in one state should not be able to move freely to another state and immediately resume practice. Communication among the states regarding disciplinary actions taken against practitioners is critical for public protection. A number of national professional associations as well as the federal government (National Practitioner Data Bank) have established disciplinary data bases for use by state regulatory boards.

Once granted, a credential should remain valid only for that period during which the holder can provide evidence of continued competency.

Regulatory boards and agencies usually make a strenuous effort to ensure that applicants are initially competent, but they are often much less zealous in monitoring the competence of practitioners after they have been licensed. Thus, the public may have no continued assurance that licensees have kept abreast of developments and can still provide safe and effective practice.

One problem related to the issue of continued competency is that inactive practitioners can preserve their right to practice by simply paying the renewal fee. By keeping their licenses active, they are able to resume practice at any time even though they may have failed to maintain the minimal level of competency deemed necessary for safe practice. States should attempt to identify practitioners who have been inactive in their practice for a substantial period of time. Once identified, these practitioners should be required to demonstrate that they have maintained an appropriate level of competency prior to having their license renewed.

A number of strategies have been proposed for assuring continued competence. While many states have adopted mandatory continuing education as a condition of relicensure, there is no strong research support indicating that mandatory continuing education assures long-term continued competency. For this reason, consumer advocacy groups are asking whether the cost of such education, ultimately borne by the public, provides consumers with any added protection against incompetent practitioners.

The concept of reexamination as a condition for relicensure has been discussed by many professions and occupations. Although not typically implemented at the

state level, a number of private certifying agencies are imposing this requirement on their certified members in order for them to remain certified. Because there are so few examples of requiring reexamination to assure continued competence, it remains to be seen whether this is a practical and cost-effective way of dealing with the public's concerns.

A non-punitive approach to assure the competence of physicians has been instituted in the Province of Ontario and is jointly sponsored by the medical colleges, the Ontario Medical Society and the Ontario regulatory body. This program is unique in that it provides assessment and remedial education not only for physicians who have been referred by hospitals, peer review panels or the board, but is also available to physicians who refer themselves because they are returning to practice after a prolonged absence, are changing the nature of their practice or simply want to enhance their skills. The goal of the program offered at McMasters University is to identify a practitioner's areas of weakness through an extensive assessment procedure and then to establish a focused program of educational remediation tailored to match the individual's needs. Following the educational phase, an evaluation is made to verify that the program has accomplished its intended purpose.

Peer reviews, by direct observation or a review of records, has been initiated by some groups as an alternative method to periodic reexamination. While this method provides the public with some assurance that the practitioner is competent, there are doubts about the dependability of peer review procedures. Some studies

have shown that qualified experts neither agree as to what constitutes acceptable performance nor do they apply standards uniformly. For peer review to be beneficial, greater attention must be given to objectively defining "acceptable performance" standards and the training of evaluators in the use of these standards.

A vigorous enforcement and discipline policy for those individuals found unfit to practice has also been instituted by many boards and agencies. This approach assumes (1) that most practitioners, acting in their own self-interest, make an effort to remain competent; and (2) only a small minority, for a variety of reasons, fail to maintain a necessary level of competency. A problem inherent in this approach is that very few licensees ever have complaints filed against them either because the public is not knowledgeable about what to expect or is unaware of where a complaint should be filed. Professional peers and employers are also hesitant to file complaints. Accordingly, the number of licensees against whom complaints are filed are small and may not accurately reflect the number of practitioners who have not maintained a reasonable level of competency.

Complaints should be investigated and resolved in a manner that is satisfactory and credible to the public.

Once complaints are received, they should be reviewed and acted upon promptly and efficiently. If the complaint is not a violation of the law and rules, the

complainant should be notified of such and informed of other available avenues. If the complaint appears valid, a thorough investigation should be undertaken to substantiate or refute the complaint immediately. At the same time, the licensee deserves to receive due process protection.

Whether the board members are involved in the investigation or independent investigators are used, the process should be fair and impartial.

Once a determination has been made that a violation has occurred, the licensee should have the opportunity to present his or her view of the situation. In some states, the entire board hears the case and determines the penalty, if any, to be imposed. In other states, a hearing officer or administrative law judge hears the case, summarizes and presents the facts and findings, and recommends appropriate sanctions to the board. The board may then agree, modify or disagree with the penalty suggested. In other states, a combination of these two procedures are used. Regardless of the process, fairness, promptness, accuracy and a recognition of public protection should be maintained.

In terms of the penalty imposed, a number of states are now granted the authority to do more than just suspend or revoke a license. They may also impose fines, require additional education, mandate supervised practice or even require restitution be made to the individual(s) harmed. The determination of the penalty is based on the seriousness of the violation.

The public should be involved in the regulatory process.

When licensing boards were first formed, the philosophy was that only members of the profession or occupation were qualified to make judgments about entrance standards, examination content, or disciplinary matters. Defenders of this professional mystique argued that the public had no real role to play in the regulatory process.

During the past two decades, this view has been challenged. Because regulation has a direct impact on the public, consumer advocacy groups believe the public should be actively involved in the regulatory decision making process.

This challenge has been met and most boards now include public members or auxiliary personnel. The addition of individuals who are not members of the regulated group should assist the professional board members in more fully recognizing the needs of the public. They also provide a point of view which might otherwise be absent if a board is composed solely of licensees. While public members may not know much about the technical aspects of the regulated group, they can make a contribution by raising questions and concerns about certain decisions.

The regulatory structure should promote accountability and public confidence.

Throughout the history of state licensure, the primary mechanism for administering regulatory statutes has been through boards composed of members of the licensed profession. In some instances, boards have operated

autonomously; in other instances, a number of boards are administered by a centralized agency.

Some form of centralized agency was in place in five states prior to 1930: Board of Regents of the University of the State of New York (1892), Illinois Department of Registration and Education (1917), Washington Department of Licenses (1921), Pennsylvania Bureau of Professional Licensing in the Department of Public Instruction (1923), and California Department of Professional and Vocational Standards (1929). Since the early 1900's some of these agencies have been reorganized and other centralized agencies have been created.

The establishment of central licensing agencies is generally based upon four principles of public administration:

(1) Grouping agencies into broad functional areas;
(2) Establishing relatively few departments to enhance the span of control and pinpointing responsibility to the chief executive and the legislature;
(3) Delineating single lines of authority to the top; and
(4) Administering departments by an individual and not by boards or commissions.

Based on responses from 113 agencies, five regulatory models were identified in 1979. These five basic structures were reconfirmed by a 1990 survey and are shown in Table 1. Table 2 includes the primary structure in each state.

Regardless of the structure, the following characteristics should be present in every regulatory entity:

(1) Appropriate professional expertise in the decision making process;

(2) Input from the public who are ultimately impacted by any regulatory decision;
(3) Fiscal accountability to the citizens of the state;
(4) Decisions made with the public's interest, as opposed to the profession's interest, in mind;
(5) Avoidance of unnecessary bureaucratic "red tape" for current or future licensees as well as the public;
(6) Staffing that includes individuals with the relevant expertise to handle the administrative details of regulation;
(7) Avoidance of political pressure and influence in decision making;
(8) Appropriate checks and balances included in the overall operations;
(9) Automation of administrative functions, as appropriate;
(10) Impartial review and resolution of jurisdictional disputes;
(11) Clear delegation of authority from the executive and legislative branch to the regulatory body;
(12) Timely and appropriate orientation of new board members as to their role and responsibilities;
(13) Timely investigations of complaints;
(14) Timely and appropriate disciplinary action taken against licensees who violate the law or rules; and
(15) Periodic assessment of the regulatory law and rules.

Table 1
Models Describing the Organization of Professional and Occupational Regulation in the States

Model A	Boards are autonomous. They hire their own staff, make decisions about office location, purchasing, and procedures. Each board receives and investigates complaints and disciplines licensees. Each board is responsible for the preparation, conduct, and grading of examinations or the contracting out of these tasks. Each board sets qualifications for licensing and standards for practice. Boards collect fees and maintain financial records. Board staff prepares and mails applications for licensing and renewal, licenses and answers inquiries from licensees and the public.
Model B	Boards are autonomous, but less so than in Model A. They set policy and determine standards regarding licensing and professional practice. They prepare or approve exams and decide who is qualified for licensure. They handle complaints and discipline licensees. The board has responsibility for hiring and supervising staff. A central agency may be responsible for housekeeping matters such as providing space, answering routine inquiries, collecting fees, issuing licenses, and renewals.
Model C	Boards are autonomous and have decision making authority in many areas. The central agency, however, has greater authority over certain functions than in Model B. Its powers go beyond housekeeping. For example, board

budgets, personnel, and records may be subject to some control by the agency. Complaints and investigations and adjudicatory hearings may be handled by a central staff, even when boards continue to make final decisions with respect to disciplinary actions.

Model D

Boards are not fully autonomous. That is, they do not have final decision making authority on all substantive matters as do boards in the preceding models. While the central agency provides a wide range of services, in practice, boards may be delegated responsibility for such functions as preparing or approving exams, setting pass/fail points, recommending professional standards, and recommending disciplinary sanctions. A crucial distinction, however, between Model D and the preceding models is that certain board actions are subject to review by the central agency.

Model E

The regulatory system is run by an agency director, commission, or council, with or without the assistance of a board. Where boards do exist, they are strictly advisory. The agency director, commission, or council has final decision making authority on all substantive matters. Boards may be delegated such functions as preparing or approving exams, setting pass/fail points, recommending professional standards, and recommending disciplinary sanctions. A crucial distinction between this model and Model D is that where boards exist, they serve only in an advisory capacity.

Table 2
Primary Organizational Model Used in Each State for Professional and Occupational Regulation

STATE	MODEL TYPE A	B	C	D	E
Alabama	*	...	...	...	...
Alaska	...	...	*	...	...
Arizona	...	*	...	...	...
Arkansas	*	...	...	...	...
California	...	...	*	...	...
Colorado	...	...	*	...	...
Connecticut	...	...	...	*	...
Delaware	...	...	*	...	...
Florida	...	...	...	*	...
Georgia	...	...	*	...	...
Hawaii	...	...	*	...	...
Idaho	...	...	*	...	...
Illinois	...	...	...	...	*
Indiana	...	...	*	...	...
Iowa	*	...	...	...	...
Kansas	*	...	...	...	...
Kentucky	*	...	...	...	...
Louisiana	*	...	...	...	...
Maine	...	...	*	...	...
Maryland	...	...	*	...	...
Massachusetts	...	...	...	*	...
Michigan	...	...	...	*	...
Minnesota	...	*	...	...	...
Mississippi	*	...	...	...	...
Missouri	...	...	*	...	...
Montana	...	...	*	...	...
Nebraska	...	...	...	...	*
Nevada	*	...	...	...	...
New Hampshire	*	...	...	...	...
New Jersey	...	...	*	...	...

	MODEL TYPE				
STATE	A	B	C	D	E
New Mexico	*	...	...	...	...
New York	...	...	...	...	*
North Carolina	*	...	...	...	...
North Dakota	*	...	...	...	...
Ohio	*	...	...	...	...
Oklahoma	...	*	...	...	...
Oregon	*	...	...	...	...
Pennsylvania	...	...	*	...	...
Rhode Island	...	...	*	...	...
South Carolina	*	...	...	...	...
South Dakota	*	...	...	...	...
Tennessee	...	...	*	...	...
Texas	...	...	*	...	...
Utah	...	...	...	*	...
Vermont	...	...	*	...	...
Virginia	...	...	*	...	...
Washington	...	...	...	*	...
West Virginia	*	...	...	...	...
Wisconsin	...	...	*	...	...
Wyoming	...	...	*	...	...
Totals	17	3	21	6	3
%	34%	6%	42%	12%	6%

NOTE: Only the predominant model is reported for each state. In any given state, a number of boards may reside outside of the "traditional" professional and occupational licensing organizational system. Primary examples of these include professions and occupations related to agriculture, the environment and insurance. Based on 1989 data.

Questions Legislators Should Ask

In the mid-1970's, Educational Testing Service and Council of State Governments staff synthesized material from a variety of sources in order to provide a comprehensive list of questions that legislators may wish to ask of groups sponsoring regulatory legislation. Not all questions will be applicable in every situation; however, the topics provide a useful checklist not only for legislators, but also for groups sponsoring legislation. The questions should prove beneficial for states with formal Sunrise and Sunset reviews as well as for states who do not have such reviews.

The primary guiding principle legislators should remember as they evaluate requests for new regulation is whether an unregulated profession or occupation presents a **clear and present danger to the public's health, safety and welfare.** If the potential for harm exists, some form of regulation may be necessary; if it does not, regulation is probably unnecessary and a waste of the taxpayers' money. A similar principal is true when legislators review requests for a revision to regulatory statutes -- does the request provide greater protection for the public or does it merely serve the profession?

Today, the number of professions and occupations regulated by states through licensure, certification and registration is over 1,100. Approximately 600 of these categories are regulated through licensure; however, fewer than 60 are regulated by more than half the states. The lack of uniform requirements among the states raises concerns about the quality and meaning of consumer protection (Brinegar and Schmitt, 1992).

What Is The Problem?

√ Has the public been harmed because the professional or occupational group has not been regulated?
- To what extent has the public's health, safety, or economic well being been endangered?

√ Can the claims made by the proponents of regulation be documented?

Why Should the Profession or Occupation Be Regulated?

√ Who are the users of the services offered?
- Are they members of the general public who may lack the necessary knowledge to evaluate the qualifications of providers and the outcome of the service provided?
- Are they institutions or qualified professionals who have the knowledge to evaluate qualifications and outcomes?

√ What is the extent of autonomy of practitioners?
- Is there a high degree of independent judgment required of practitioners?
- How much skill and experience are required in making these judgments?
- Do practitioners customarily work on their own or under supervision?
- If supervised, is the supervisor covered by regulatory statute?

Note: For many professions and occupations, if practitioners work under licensed supervision, licensure of the supervisee may not be necessary.

What Efforts Have Been Made to Address the Problems?

√ Has the profession or occupation established a code of ethics?
- To what extent has it been accepted and enforced?

√ Has the profession or occupation established complaint-handling procedures for resolving disputes between practitioners and public?
- How effective has this been?

√ Has a nongovernmental certification program been established to assist the public in identifying qualified practitioners?

√ Could the use of applicable laws or existing standards solve problems?
- Could unfair and deceptive trade practices laws be used?
- Could civil laws such as injunctions, cease and desist orders, etc., be used?
- Could criminal laws such as prohibitions against cheating, false pretenses, deceptive advertising, etc., be used?
- Could existing standards such as construction codes, product safety standards, etc., be used?

√ Would strengthening existing laws or standards help to deal with the problem?

Have Alternatives to Licensure Been Considered?

√ Could an existing agency be used to regulate the profession or occupation?

√ Would regulation of the employer rather than the individual practitioner. e.g., licensing restaurants rather than cooks or waiters/waitresses, provide the necessary public protection?

√ Could registration of practitioners coupled with minimum standards set by a state agency be used?

√ Would certification of practitioners be an acceptable alternative? The use of a title would be restricted to those who have demonstrated competence, but they would not have sole control of the field of practice.

√ Why would the use of the above not be adequate to protecting the public's interest?

- Why would licensing be more effective?

Will the Public Benefit from Regulation of the Profession or Occupation?

√ How will regulation help the public identify qualified practitioners?

√ How will regulation assure that practitioners are competent?

- What standards are proposed for granting credentials?
- Are all standards job related?
- How do these standards compare with those required by other states?
- If standards differ from those of other states, can the difference be justified?
- Are there training and experience requirements?
  - Are these requirements excessive when compared with other states? Why?
  - Does training include supervised field experience? If so, is an additional experience requirement justified?
- Are there restrictions on where or how experience may be acquired? Why?
- Will alternative routes of entry be recognized?
  - Will applicants who have not gone through prescribed training/experience be eligible for licensure?
  - Will licensure in another state provide an avenue for an individual to be credentialed in this state?

- Will applicants for licensure be required to pass an examination?
  - Does an examination already exist?
  - Does it meet national, professional and legal testing standards?
  - If no test exists, who will develop it and how will development costs be met?
  - What are the qualifications of the individual or group that would develop the test?
- Is there a "grandparent" clause in the proposed regulation?
  - Why is it necessary?
  - Will such practitioners be required to take a test at a later date?

√ What assurance will the public have that the individuals credentialed by the state have maintained their competence?
- Will the regulation include an expiration date for the licenses?
- Will periodic license renewal be required?
- Prior to renewal, will the practitioner be required to take an examination, be subject to peer review, show evidence of continuing education or other evidence of continued competence?

√ How will the public's complaints against practitioners be handled?
- Will there be a method for receiving complaints?
- Will there be a timely and thorough investigation of complaints?

- Will there be an effective procedure for disciplining incompetent or unethical practitioners?
- What grounds will there be for suspension or revocation of credentials?
- What other disciplinary options, such as fines or restitution, will be available?

√ Is it feasible to establish a restitution fund so that the public will be able to recover money lost through actions of unscrupulous practitioners?

Will Regulation Be Harmful to the Public?

√ Will competition be restricted by the regulated group, e.g., prohibiting price advertising?

√ Will the regulated group control the supply of practitioners?

- Are standards more restrictive than necessary?

- Will entry by those from other states who have substantially similar qualifications be unreasonably restricted?

√ Will regulation prevent the optimum utilization of personnel?

- Will the intended "scope of practice" prevent individuals from other professions or occupations from providing services for which they are qualified by training and experience?

√ Will regulation increase the cost of goods and services to consumers?

√ Will regulation decrease the availability of practitioners?

√ Are there safeguards in the proposed law to ensure that the regulated group does not use its power to promote their own self-interest over that of the public?

How Will the Regulatory Activity Be Administered?

√ Who will be responsible for administering the regulation?

√ What will be the composition of the board, if required in statute?
- Will there be public members or auxiliary professionals on the regulatory entity? If so, what proportion will be non-professional members?

√ What power will the regulatory entity have?
- Will it review qualifications, develop or approve examinations, conduct investigations, and/or discipline practitioners?
- Will it promulgate rules and codes of conduct?

√ Will actions of the regulatory entity be subject to review?
- By whom?

- Will the reviewing authority have the power to override the regulatory entity's actions? If only some actions can be overruled, which ones?

√ How would the cost of administering the regulatory entity be financed?
- How will fees be set?
- Will income from fees go into general fund, agency fund, or a special account controlled by the regulatory entity?

Who Is Sponsoring the Regulatory Program?

√ Are members of the public sponsoring the regulatory program?

√ What associations, organizations, or other groups in the state represent the practitioners?
- Approximately how many practitioners belong to each group?
- What are the different levels of practice in each group?
- Are different philosophies of practice expounded by the various professional groups?

√ Which of the above groups are actively involved in sponsoring regulatory programs?
- Are other groups supporting the effort? If not, why?

Why is Regulation Being Sought?

- √ Is the profession or occupation seeking to enhance its status by having its own regulatory law?

- √ Is the profession or occupation claiming it is prevented from rendering services for which its members are qualified because of the "scope of practice" statement of another group?
  - If so, what efforts have been made to resolve differences?

- √ Is the profession or occupation seeking licensure in order to gain reimbursement under federal or state programs or private insurers?

- √ Is the public seeking greater accountability of the profession or occupation?

Definition of Selected Key Terms

Americans with Disabilities Act	The Americans with Disabilities Act (ADA) is a federal law that became effective January, 1992. The ADA mandates that all examination candidates with a disability covered by the Act be given the opportunity to take an examination that does not discriminate on the basis of that disability. Both the state and any private organization developing or administering the examinations are covered. The Act also requires that licensure, registration or certification denials not be made solely on the basis of the disability.
Certification	May be granted by either a state regulatory body, or a non-governmental agency or association. Title protection is granted to persons who have met the predetermined qualifications. Those without the title may perform the services of the profession or occupation, but may not use the title.
Credentialing	A generic term for licensure, certification, and registration. Can also be used as a term for a voluntary process under the auspices of private sector associations.

Disciplinary Actions	Sanctions taken against licensees or unlicensed individuals by licensing boards or agencies following notice and an opportunity for a hearing on the violation(s) of licensing laws and regulations. Disciplinary action may include:
Censure	Similar to a reprimand. The agency makes an official statement of displeasure concerning the individual.
Fine	A monetary penalty imposed by the administrative agency for a violation of an administrative rule or regulation.
Probation	Conditions imposed upon an individual's practice. Once a specified time period has elapsed, the individual may resume unconditional practice.
Public Reprimand	Similar to censure. The agency makes a public statement of displeasure concerning the individual's behavior.
Restricted License	A reduction in the licensee's permitted scope-of-practice.

	Revocation	The professional's license is involuntarily terminated.
	Suspension	The licensee is not permitted to practice for a specified period of time.
Endorsement		The acceptance of a licensee's qualifications based on the fact that the requirements met initially were substantially equivalent to those required in the new state.
Licensure		The most restrictive form of state regulation. Under licensure laws, it is illegal for a person to practice a profession without first meeting the standards imposed by the state. It is illegal for unlicensed individuals to perform acts within the statutorily defined scope of practice.
National Practitioner Data Bank		A national data bank on disciplinary actions taken against dentists and physicians, implemented by the U.S. Department of Health and Human Services. The data bank, as originally conceived, was to contain information on all clinical privileges, licensure disciplinary actions, malpractice payments and professional membership society losses of all licensed health practitioners. Plans for this comprehensive data bank have not been realized.

North American Free Trade Agreement	An extension of the earlier General Agreement on Tariffs and Trade (GATT) designed to eliminate barriers to trade in goods and services among Canada, Mexico and the United States of America, including mutually licensed and certified professions.
Reciprocity	An arrangement through which a practitioner in one state may practice in another if the two states have a reciprocal agreement.
Registration	The least restrictive form of state regulation, usually consisting of requiring individuals to file their name, address and qualifications with a government agency before practicing the profession.
Sunrise	Proposed regulatory legislation and supporting materials are drafted by the professional group seeking regulation and reviewed by a legislatively-enacted body that recommends to the legislature whether regulation is appropriate and, if so, the type of regulation.
Sunset	The periodic, automatic termination of regulatory boards and agencies unless legislative action, based on review and recommendation of a legislatively-enacted body, is taken to reinstate them.

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