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GREY AREAS NEWSLETTER

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Transparency is Not Enough

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September 2024 - No. 294

A recent research paper concludes that even extensive transparency requirements are not enough to ensure that self-regulating professions effectively protect the public from serious safety concerns.

The paper, cited as: Ece Kaynak, Hatim A. Rahman (2024) "It Takes More Than a Pill to Kill": Bounded Accountability in Disciplining Professional Misconduct Despite Heightened Transparency. Organization Science 0(0), while quite narrow in scope, will likely interest a variety of regulators.

The researchers studied the sanctions imposed on physicians found to have overprescribed opioids during the height of the opioid epidemic between 2015 and 2019. They examined the records in a (deliberately unnamed) US state where sunshine laws required a high level of transparency. Indeed, in that state, the discussions by the tribunal during deliberations in the penalty phase of discipline process were recorded and made publicly available. In Canada, those discussions are strictly confidential under the principle of deliberative privilege, to facilitate candour during such debates. The research team listened to and transcribed the recordings related to opioid discipline cases.

The article begins with a review of recent literature on the benefits of openness, stating that transparency "promotes desired behaviors when those subjected to transparency measures are motivated to align their behaviors with external audience expectations because of normative pressures, legitimacy concerns, and/or reputation management". Further:

> Extending the transparency literature's insights suggests that when professional bodies' self-regulation processes are made transparent to the public, professionals put in charge of disciplining their peers' misconduct should be more diligent in doing so, especially in cases of clear and documented misconduct, because exercising effective self-regulation helps the profession protect its reputation as a trustworthy profession serving the public good….

The researchers concluded:

> Yet contrary to predictions based on the literature on transparency, in our analysis, we found that the Board overwhelmingly refrained from levying strict disciplinary action on physicians found guilty of misconduct, and instead, it allowed guilty physicians to continue practicing medicine. This limited accountability that guilty physicians faced was not solely because of sympathy between peers or norms of collegiality, however, as the professions literature would predict. We found that mechanisms based on organizational- and field-level factors also played a significant role in the decision-making process, preventing the Board from holding guilty physicians strictly accountable for their misconduct.

The researchers were not the decision makers, so one could dispute whether the conclusion of "limited accountability" for guilty physician was objectively fair and reasonable, but after reading the full article one suspects that description is accurate. Given the consequences on patients of overprescribing opioids (a leading cause of death in the US), and the fact that the unnamed state was taking active measures to combat the epidemic, including scrutinizing the handling of opioid-related discipline cases, the examples and quotations cited from the deliberations of the regulatory Board in issue make a persuasive case for the researcher's observation of "bounded accountability".

Of the 112 cases reviewed, only six resulted in revocation of the physician's licence despite the Board often discussing in their deliberations how revocation was an appropriate outcome. In fact, in many of the cases in which revocation was not ordered, the regulatory Board explicitly acknowledged that revocation would "send a signal to external audiences".

The researchers identify four mechanisms that contributed to this outcome.

1. **Bureaucratic Inefficiencies.** Revocation would ordinarily require a full hearing. Hearings are expensive and time consuming. It appears that making an interim order was not available to this regulator. The Board met only six times a year meaning that any hearing would be held far in the future. The regulator also had significant budgetary constraints.
2. **Information Asymmetries.** Physicians facing serious discipline often obtained registration in another jurisdiction before the discipline outcome was posted on the national database. The state in which the physician is newly registered is not automatically notified of the outcome. Not only did this scenario continue to place the public at risk elsewhere, it sometimes affected the discipline process in the original jurisdiction. For example, resolutions are sometimes considered where the physician agrees not to practice in that jurisdiction. Such a resolution might also minimize the depth of the concern by the regulator in the registrant's new jurisdiction. This impact of such information gaps has been the subject of an investigative journalism series published in the Toronto Star.
3. **Shared Professional Beliefs.** The researchers "found that a shared professional belief in rehabilitation, as opposed to a rigorous sanction, constituted the most prominent mechanism contributing to bounded accountability for guilty physicians in our data." Not everyone will agree with the researcher's critique of this "shared professional belief". The bias towards rehabilitation is widely

accepted by regulators as a desirable form of "right touch regulation". Rehabilitation of registrants is a recognized academic and legal consideration, and forms a core value for most quality assurance programs. The researchers appear to question the appropriateness of this belief in some contexts, such as overprescribing opioids. This questioning of the value of rehabilitation where arguably protection of the public should be the primary consideration is also consistent with some case law dealing with disciplinary sanctions. The researchers also have some data that rehabilitation for overprescribing opioids does not necessarily deter subsequent misconduct.

4. **Interpersonal Emotions.** "Guilty physicians sometimes made emotional appeals that resonated with Board members and caused them to develop feelings of sympathy and compassion toward guilty physicians. These emotions led Board members to refrain from stringent disciplinary measures." However, the researchers found that this consideration appears to be less significant than other literature suggests and is less likely to affect the sanction decision than the other three mechanisms discussed above. They theorize that greater transparency in the process may have contributed to this consideration becoming less prominent.

Interestingly, the researchers found that the six revocation cases also had some common characteristics. "These data reveal that the Board revoked a physician's license primarily when the physician refused to engage or comply with the Board's authority or when a higher-order court found the physician guilty."

The researchers concluded that expanded transparency requirements, while valuable, did not, on their own, produce strict disciplinary outcomes. The researchers proposed the following reforms, which they believe might contribute to more effective accountability:

1. Regulation at a national level, rather than a state level.
2. Ensuring regulators have adequate resources. This appears to be easier to achieve in Canada where regulators are often funded by registrant fees that the regulator sets (as opposed to having to apply to the government for funding from its general budget which is more common in the US).
3. Taking steps to ensure that regulators not be dominated by professional beliefs and assumptions. Even public members of Boards were observed to defer to the expertise of the professional members. The researchers indicated that having more public members on the Board (say 50%) could affect this dynamic.

We might add the following thoughts:

1. Even if regulation at the national level is not achievable in the short term, certainly a national register of practitioners could be pursued. Some Canadian professions are already doing this.
2. The authority of regulators to impose interim restrictions on registrants who pose a risk to the public, pending investigation and discipline, can mitigate bureaucratic pressure to accept less appropriate outcomes and achieve some protection to the public in the short term.
3. Using a competency-based selection process for Board and committee members might help address some of the concerns addressed by the

researchers about over-reliance on the expertise of professional members.

4. Penalty guidelines for high-risk misconduct, such as over-prescribing opioids, could prevent considerations, like expressions of remorse or willingness to undergo rehabilitation, from having a disproportionate effect on decision makers. By way of analogy, the mandatory sanctions for sexual abuse by health practitioners seem to have been at least somewhat effective in reducing the imposition of inadequate outcomes. In another analogy, it has been suggested that restorative justice initiatives not be used for major safety concerns.

This research gives much food for thought for all regulators of professions who deal with serious safety concerns.

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