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Book Review: "The Licensing Racket" – Part 2

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As noted in part 1 of this article, Rebecca Allensworth of Vanderbilt Law School has published a thought-provoking book on professional regulation (licensing) in the United States.

In part 1 we looked at the first major theme of the book: that licensing creates barriers (often unnecessary), to entering the profession and those barriers protect the resulting monopoly. In part 2 we begin by looking at the second major theme of the book: that licensing creates systemic challenges for regulatory boards to adequately protect the public.

Systemic Challenges to Protecting the Public

Allensworth describes the theory of licensure as follows:

> The arrangement between society and the professions is often described as the "grand bargain". For its part, society agreed to leave the professions alone from governmental interference and to confer a high degree of trust and esteem on their members. In exchange, the professions agreed to regulate themselves in the public's interest, to police their own, and keep us safe. … Every day, we hold up our end of the bargain by giving state licensing boards nearly unfettered autonomy over their professions.

Allensworth argues that licensing boards all too frequently do not uphold their side of the bargain. She does not fault the individuals involved and says: "the failures of our professional licensing system are utterly banal." She adds: "I also learned that the typical board member is well-meaning and of high integrity; I did not meet a single board member who did not take seriously his or her obligation to the people of the state of Tennessee" (the state that was the focus of her research). The problem is the system.

Returning to an earlier point, Allensworth says that the lack of board member expertise also applies to the discipline process where these board members must adjudicate at

formal, legalistic, hearings. This, and relying primarily on consumer complaints to initiate the process, having insufficient funding for the process, and the existence of extensive delays caused, in part, by board-member availability all contribute to inadequate protection of the public from harmful licensees. Several disturbing examples of "too little, too light" discipline are provided to illustrate this concern.

In Chapter 7 the author provides a poignant discussion of patently inadequate disciplinary sanctions. Using several examples related to opioid dispensing and sexual abuse, particularly by physicians, she postulates two systemic causes of this outcome. The first is the emotional identification by professional board members with their colleagues facing discipline: "None of us are perfect." Using the "4D" model, licensees are viewed as engaging in misconduct because they are "dated, duped, disabled, or dishonest." However, due to their professional culture, background, and lack of training, professional board members are extremely reluctant to conclude that the licensee was dishonest. Allensworth argues that "the real workhorse of the 4D model is "disabled", meaning that regulators apply an "illness model" to discipline (especially for health profession regulators, who are already inclined towards the "recovering and repairing" mindset).

The second systemic cause is the role of professional associations and other groups that advocate for the profession's interests. Allensworth is critical of regulators' dependence on private professional health programs (i.e., programs that facilitate or provide treatment for professionals with mental health and addiction issues) that are often closely aligned with professional groups and which have little oversight. She also reiterates that advocacy groups have significant influence on regulatory standards making and policy development.

Allensworth also suggests that those with a disciplinary history are all too often not removed from the profession. She reports that licensees who have been disciplined are thirty times more likely to be disciplined again than licensees who have a clean record (p. 109). Disciplined licensees tend to practice with the most vulnerable of populations, such as: in privately run or underfunded institutions; in programs serving rural, low-income people; as court-appointed public defenders; with incarcerated populations; and in cash-based solo practice. She also suggests that there is a "professional caste system" in which regulators may permit unethical or less competent licensees to continue to practice in underserviced communities (i.e., questionable care is better than no care at all).

Chapter 9 of the book describes the interplay between professional licensing and the criminal justice system. In some cases, criminal proceedings were initiated by authorities who recognized the limitations of the licensing system for such things as unjustifiable drug dispensing and sexual assault. However, criminal courts are generally not equipped to handle concerns about the quality of practice. In addition, the involvement of the criminal process often dissuades regulators from taking early action (to ensure a fair trial for the practitioner but also to obtain a "free ride" with respect to investigating and proving the allegations). Allensworth concludes that having two accountability systems is often worse than having just one.

The differences between the US and Canadian complaints and discipline system are subtle but may mitigate some of the concerns in the US noted by Allensworth:

- Most Canadian regulators have separate discipline committees. Boards rarely conduct the hearings themselves. There is also a movement in Canada to increase the independence of discipline tribunals

from the board and ensure enhanced public and legal representation on them. Where there is not a lawyer on the panel, most discipline tribunals retain experienced independent legal counsel to advise them.
- Many Canadian jurisdictions have mandatory revocation laws for health care practitioners who commit sexual abuse of patients.
- Canada's public health system, together with its social service structure may reduce (but certainly does not eliminate) the possibility of "fallen" practitioners to continue harming the public without regulatory oversight.
- Many regulators in Canada do not rely solely on client complaints to identify concerns. Inspection regimes, quality assurance programs, and mandatory reporting requirements are more prevalent for Canadian regulators than the US licensing boards described by Allensworth.
- While not universal, there appears to be a higher degree of transparency required of Canadian regulators than required in the US. Increasingly, Canadian regulators publicly post inspection results and significant complaints outcomes, as well as disciplinary findings.

Proposed Solutions

In her conclusion, Allensworth makes some recommendations for less licensing and for more effective licensing where it remains necessary:

- Eliminate licensing requirements for occupations and professions except where the public protection rationale is compelling.
- Consider alternative models of regulation, such as codified regulation, like the inspection of premises measured against objective requirements (not a vague code of ethics) administered directly by the government.
- Enable inter-state mobility of licensees.
- Ensure adequate resources for boards to fulfill their mandate.
- Move to competency-based selection of board members who are adequately compensated so that they can devote the necessary time to their work, with non-licensees constituting a majority.
- Increase transparency including live-streamed board meetings, accessible complaint making procedures, public access to outcomes during various stages of the complaints and discipline process, and discipline hearings conducted with trained panel members (including lawyers) with only one licensee on the panel.
- Consider having independent disciplinary tribunals.
- Increase training for board and discipline panel members.
- Introduce hearing procedure and sanctioning guidelines for discipline findings.
- Consider national licensure.

Allensworth uses the UK example of the General Medical Council as one regulator that has incorporated many of these reforms. A key component of the UK regulatory system not referenced in the book is the Professional Standards Authority, which provides scrutiny of, and the right to appeal, inadequate disciplinary outcomes (among other things).

We suggest that the various frameworks for professional regulation across Canadian jurisdictions and professions provide additional models for comparison for those interested in studying regulatory reform.

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