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Which professions should be licensed?

Criteria legislators employ

As a follow-up to “State regulation of medical assisting: Exploring the legal and political dimensions” in the previous issue,¹ this article addresses the criteria that state legislatures and legislators use for determining which professions should be either licensed or subject to another type of state regulation. The following does not discuss which criteria state lawmakers *should* employ in making regulatory decisions. Two publications of the Council on Licensure, Enforcement, and Regulation (CLEAR)—*Questions a Legislator Should Ask*² and *Demystifying Occupational and Professional Regulation: Answers to Questions You May Have Been Afraid to Ask*³—serve as the primary sources for this article.

Definition of licensing or licensure

Although there are a variety of definitions of licensing or licensure, there is general agreement on the concept. The following definition expresses the concept very well:

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.²

Insufficient basis for licensing

The following are insufficient reasons for a state legislature

to license a profession, according to the current consensus of public policy analysts:

1. Enhancing the recognition, visibility, and distinctiveness of a profession
2. Ensuring that the more highly educated members of a profession are given a special status in the law
3. Increasing the income of members of a profession, or certain members of a profession

Fundamental criteria for licensing

In what situations, then, is licensing of a profession sound public policy? In a nutshell, from the societal welfare perspective, licensing laws should be enacted only when the lack of licensure would result in harm to the patients or clients of the unlicensed professionals. Note the following threshold questions²:

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.²

Here is another statement of these fundamental criteria³:

Professions and occupations should be licensed only when:

- Their unregulated practice can clearly harm or endanger the health, safety, and welfare of the public and when the potential for such harm is easily recognizable and not remote or dependent upon tenuous argument; and
- The public needs, and will benefit by, assurance of initial and continuing professional and occupational ability; and
- The public is not effectively protected by other means; and
- It can be demonstrated that licensing would be the most appropriate form of regulation.³

When alternatives to licensing may be appropriate

A discussion of other forms of state regulation is beyond the scope of this article. However, CLEAR has consistently taken the position that—even if there is evidence that a profession should be regulated—licensing is not always the optimal mode of state 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*. [Emphasis added]²

CLEAR also offers principles for determining the appropriate form of state regulation³:

Regulations of any type constitute restraints on the exercise of free choice. Government should only exercise its power to regulate when it is found that regulation is clearly necessary for the preservation of the health, safety, and welfare of the public. Each provision of every regulation must have as its sole objective the protection of the public, must constitute *the least burdensome method* of achieving that purpose, and must be *no more restrictive than the minimally acceptable standards of care* to be provided to the public. [Emphasis added]³

Questions legislators should ask

The following are some of the specific questions that CLEAR recommends legislators ask when weighing the pros and cons of licensure:

- 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 outcomes 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.²

Licensing laws should be enacted only when the lack of licensure would result in harm.

Some AAMA members may be of the opinion that the medical assisting profession should be licensed. On the other hand, some members may be opposed to licensure. Regardless of one's position, members should be familiar with the principles and criteria state legislators and other state decision makers use in determining whether a profession or occupation should be licensed or regulated in some other way. ◀

References

1. Balasa DA. State regulation of medical assisting: exploring the legal and political dimensions. *CMA Today*. 2010; 43(4): 6–7.
2. Shimberg B, Roederer D. *Questions a Legislator Should Ask*. 2nd ed. Lexington, KY: Council on Licensure, Enforcement, and Regulation; 2004.
3. Schmitt K, Shimberg B. *Demystifying Occupational and Professional Regulation: Answers to Questions You May Have Been Afraid to Ask*. Lexington, KY: Council on Licensure, Enforcement, and Regulation; 1996.

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