

The Less-Regulation Movement: Why Certification Is a Viable Option for Professional Regulation



Donald A. Balasa, JD, MBA
AAMA CEO and Legal Counsel

In at least the last seven years, an increasing number of state and federal decision-makers have become proponents of the philosophy and policy stances of the professional/occupational less-regulation movement (LRM). I have written and spoken on this topic for professional publications and conferences.^{1,2} Having studied the economic and legal arguments for and against the LRM, I have taken the position that incorporating private-sector certification into state law is a viable option (and, in some cases, the best option) for protecting the public from substandard professional services.

In this article, the terms “profession” and “patient” include, respectively, “occupation” and “consumer/customer/client.”

Definitions

Evaluating the positive and negative effects of professional credentialing is central to the debate about the optimal role of state governments in regulating professions. The following definitions are foundational for understanding the issues.

“Credential” is a generic term that encompasses (1) academic credentials, such as degrees, certificates, and diplomas; (2) credentials awarded by passing an examination—most often a licensing or certification examination; and (3) credentials awarded after successfully completing a prescribed continuing education course of study (e.g., an assessment-based certificate).

A “license” is a *mandatory* credential (usually issued by a state) without which an individual is not permitted by law to practice a profession.

A “certification” is defined most frequently as a *voluntary* credential (usually issued by a national private-sector body) that provides evidence of an individual’s

knowledge and competence in a profession. The key distinction between a license and certification is that a license is required by law but certification is (with exceptions) not required by law.

The Fundamental Economic Principle of Professional Credentialing

My fundamental economic principle for determining the optimal stringency of a credentialing examination and its eligibility requirements is applicable to both state licensing and private-sector certification. It consists of two conditions:

1. Professional credentialing should be stringent enough to protect patients from harmful and substandard services by excluding incompetent and unscrupulous individuals from the profession. If the credentialing requirements are not sufficiently stringent, the likelihood of harm to patients would increase.
2. Professional credentialing should not be so stringent that it excludes knowledgeable and competent individuals from the profession. This would artificially increase the price of professional services and lessen their availability. Too-stringent professional credentialing would also reduce the potential income of unjustifiably excluded individuals.

Corollaries of the Fundamental Principle

Two corollaries (i.e., propositions that proceed from a single or multiple just-demonstrated propositions) follow from

the previous two conditions of the fundamental economic principle of professional credentialing:

1. If a high likelihood of significant harm to patients by incompetent individuals practicing a profession exists, there should be more stringent entry and ongoing requirements for individuals to practice the profession.
2. If a low likelihood of harm to patients by incompetent individuals exists, and if any harm would be minor and impermanent, there should be less stringent entry and ongoing requirements for the profession.

The Position of LRM Proponents

Advocates for the LRM would generally agree with my fundamental economic principle and its corollaries. However, the position of LRM supporters is that—in practice—existing regulation of some professions should be reduced (or even eliminated), and unregulated professions should remain unregulated. This policy stance is reflected in the following excerpt from the Occupational Licensing Defense Act of the American Legislative Exchange Council:

The purpose of this Act is to ensure that an individual may pursue a lawful profession free from unnecessary occupational regulations and protect against the misuse of occupational regulations that reduce competition and increase prices [for] consumers. The government should use the least restrictive means of furthering important government interests in the name of public safety and not substantially burden an individual from seeking a lawful occupation.³

Underlying this antiregulatory position is the conviction that the regulation of professions should be left to free-market forces, such as civil suits against professionals

who act negligently or dishonestly, ratings of professionals published by third-party consumer protection bodies, and sanctions against unscrupulous professionals provided by state and federal consumer protection and anti-fraud laws.

Third-Party, Private-Sector Certification—an Underutilized Option

Many scholars, legislators, and organizations supportive of the LRM are aware of private-sector certification and generally view it in a favorable light. This is because certification is less restrictive than licensure and does not require the expenditure of government funds. Nevertheless, my observation is that the suitability of certification as a less intrusive and less costly alternative to state licensure has not been fully realized by policy analysts and government decision-makers.

The Advantages of Certification

There are several reasons why certification is an equally good, if not superior, credentialing mechanism for protecting patients without necessitating the creation of an executive branch licensing board:

1. Certification programs accredited by the National Commission for Certifying Agencies (NCCA) under the NCCA *Standards for the Accreditation of Certification Programs*⁴ and/or accredited by an accrediting agency under International Standard ISO/IEC 17024:2012(E), “Conformity assessment—General requirements for bodies operating certification of persons,” (also known as ISO 17024) must be based on some type of occupational analysis meeting generally accepted psychometric principles. As a result, accredited certification programs and entities accurately measure the knowledge, skills, and professional attributes and behaviors that professionals must have in order to provide services of sufficient quality in a manner consistent with legal and ethical standards.

2. As is the case with most licensing programs, certification programs accredited by the NCCA or under ISO 17024 must require periodic proof of ongoing knowledge by its certified professionals. Such ongoing knowledge can be demonstrated by continuing education (preferably, with an assessment component at the completion of the continuing education modality), peer review, retesting, self-assessment, proof of the ongoing effective and safe practice of the profession, or a combination of these requirements.
3. Private-sector certifications are almost always national in scope. In contrast, state licensing requirements and examinations can vary (sometimes considerably) from one American jurisdiction to another. Reciprocity agreements, interstate compacts, licensing by endorsement, and the relatively recent universal license recognition legislation are reducing the barriers to interstate mobility for professionals. However, as positive as these legal measures are becoming in lessening the state-by-state balkanization of professional licensing, a national certification accomplishes the same ends with fewer legal steps and potential opponents.
4. Eligibility pathways for licensure, which often include education, experience, and passing an examination, are established by state statute and/or regulations of a state agency. Changing the eligibility requirements for licensing can be politically charged, cumbersome, and time-consuming. Certification programs do not face these obstacles to the same extent as licensing programs. For example, revising the eligibility pathways for a certification is almost always a more straightforward and faster process than a legislature amending a practice act or a state professional board proposing regulations for comment by communities of interest prior to formal board approval. An advantage of the relative

nimbleness of certification programs is that they can implement alternate pathways to a certification (such as comparable training in the United States armed forces and substantially equivalent education in another nation) without governmental involvement.

5. A popular misconception is that only licensing boards have the legal authority to discipline professionals under their jurisdiction. This is not the case. NCCA-accredited certification programs are required to have standards of professional conduct for their certificants and a mechanism to investigate complaints and invoke sanctions.
6. Finally, certification programs are financially self-sustaining and do not have to rely on government funding for their operations.

The certification community should not consider the LRM as an unmitigated threat. Some certifications are prerequisites for state licensing, and these certifying programs can argue (consistent with the LRM philosophy) that their certification saves taxpayer dollars and strengthens the licensing program. Other certification programs may ally with LRM advocates in states that do not have licensing and assert that their certification can be an alternative to the creation of a state licensing mechanism. ♦

References

1. Balasa DA. The professional less-regulation movement: how should professions and regulators respond? *CLEAR Exam Rev.* Summer 2021;31(1):19-26.
2. Balasa DA. How the health professions should respond to the professional less-regulation movement. PowerPoint presented at: Health Professions Network Virtual Advocacy Workshop; March 30, 2021; virtual.
3. Occupational Licensing Defense Act. American Legislative Exchange Council. Accessed August 30, 2022. <https://alec.org/model-policy/the-occupational-licensing-defense-act-2/#:~:text=Summary%3A%20The%20purpose%20of%20this,and%20increase%20prices%20to%20consumers>
4. National Commission for Certifying Agencies. *Standards for the Accreditation of Certification Programs*. Institute for Credentialing Excellence; 2014. Accessed August 30, 2022. https://www.nasfaa.org/uploads/documents/2016_NCCA_Standards.pdf