1. What is Licensure

Kara Schmitt

Bureau of Occup & Prof Reg

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WHAT IS LICENSURE?

Kara Schmitt
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When most individuals hear the terms *license* and *licensure*, their first reaction is that these are easily understood and relatively simple words. Everyone knows what these terms mean. Or do they?

What is licensure? It is a multi-faceted, complex governmental system of regulation with the stated purpose being public protection. According to Webster’s dictionary (Guralnik, 1976), a *license* is defined as “a formal permission to do something: esp., authorization by law to do some specified thing (*license* to marry, practice medicine, hunt, etc.).” The term *Licensure* is then defined to mean “the act or practice of granting licenses, as to practice a profession.” Unfortunately, the dictionary definitions encompass a myriad of activities for which the terms *license* or *licensure* may be applicable and only serve to further complicate what is meant by these related terms.

Licensure confers upon a licensee the legal authority to practice an occupation or profession\(^1\). In 1952, The Council of State Governments defined licensing as:

> the granting by some competent authority of a right or permission to carry on a business or do an act which would otherwise be illegal. The essential elements

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\(^1\)Licensure is one of the forms of regulatory control states have over individuals wishing to practice certain occupations or professions. The term “regulation” will be used throughout this chapter to include all forms of states’ authority to control practice. Note that although licensure is the responsibility of individual states, there are a few professions that require federal licensure (e.g., airplane pilots, certain railroaders, nuclear power plant operators, and certain classes of merchant seamen).
of licensing involve the *stipulation of circumstances* under which permission to perform an otherwise prohibited activity may be granted—largely a legislative function; and the actual granting of the permission in specific cases—generally an administrative responsibility. (p. 5)

Later, Shimberg and Roederer (1994) rephrased the above definition of professional licensure.

Licensing is a process by which an agency of government grants permission to an individual to engage in a given occupation upon finding that the applicant has attained the minimal degree of competency required to ensure that the public health, safety, and welfare will be reasonably well protected. (p. 1)

Occupational and professional licensure is an activity reserved to each state by the federal constitution; the exercising of a state’s inherent police power. Licensure is designed to protect citizens from mental, physical, or economic harm that could be caused by practitioners who may not be sufficiently competent to enter the profession.

Whether licensure is viewed as a privilege or a right, it is to be granted only to individuals who demonstrate to the satisfaction of a state that they possess, at the time of *initial* licensure, the requisite minimal level of knowledge, skills, and abilities determined necessary to practice competently. Malcolm Parsons (1952) emphasized that *permission* is the essential element of licensure and that such permission “may be granted or denied, renewed or refused to be renewed, withdrawn temporarily through suspension, or withdrawn altogether through revocation” (p. 4). A license is not unconditionally granted to an individual, but usually for only a finite period of time and can be removed or limited by a state for a number of reasons.

Paradoxically, although freedom is a cornerstone of the Constitution of the United States, licensure imposes considerable restrictions upon an individual’s freedom to pursue certain career choices. Once a profession has been legislatively mandated to be licensed, it is illegal for an individual to practice that profession or use a specific title without first obtaining the necessary license. Additionally, in order to obtain a license, an individual must have been successful at meeting a variety of requirements.

Even with the expanded definitions of licensure, it is still a complex and often misunderstood term. The Hindoo fable, as told by John Saxe (1949), entitled *The Blind Men and The Elephant* provides an allegorical framework for appreciating the complexity associated with licensing.

Once there were six blind men who went to “see” an elephant so that through touch they might satisfy themselves as to what an elephant was. Each man touched a different part of the elephant and accordingly determined that an elephant was like six different items with which they were familiar. The first touched the side and proclaimed the elephant to be like a wall. The second felt the tusk and decided it was similar to a spear. The third took hold of the trunk and said that the elephant was like a snake. The fourth reached out and touched the knee and declared the elephant was like a tree. The fifth found the ear and as the ear moved, the blind man decided it was like a fan. Finally, the sixth man seized upon the swinging tail and thought the elephant was like a rope. The fable ends with the following lines:
1. WHAT IS LICENSURE?

And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right
And all were in the wrong! (p. 123)

The moral of this fable is that confrontations and wars are often started because the parties “rail on in utter ignorance of what each other mean, And prate about an Elephant not one of them has seen!” (Saxe, 1949, p. 123). Until the various factions are familiar with and understand the opposing views of all parties, battles and confusion will continue with little hope of resolution.

Although many individuals have encountered the “beast” called licensure, their perception of it is blinded by their personal involvement with it. In many instances, the various perceptions and encounters with licensure create a situation in which “each [is] partly in the right and all [are] in the wrong.” Furthermore, although debates about licensure may not lead to a full scale war, there are certainly a number of battles being fought over licensure in terms of what it entails, the scope of regulated activity, who should be licensed, and how it should be organized.

For members of a profession seeking initial licensure legislation, it may be viewed as a political game that must be won. For the candidate who hopes to practice a licensed profession, it may be viewed as an overwhelming hurdle that must be jumped. For the regulator, it is like walking a tightrope trying to balance the interests of the profession along those of the state/public. For the investigator, it is similar to a game of poker in which both skill and luck are necessary in order to obtain sufficient proof of wrongdoing. Board members who are also licensees may view it as a tug of war in which they are pulled between the mandates of their appointed public position and the desires of their professional association.

Regardless of the various perceptions, if members of each of these groups were asked to define licensure, the responses would undoubtedly be fairly similar and incorporate the following phrase—protection of the public. Even if everyone were to use the same phrase, the individual perceptions of licensure create continuous conflicts as to what is really meant by the term. In essence, licensure involves politics, economic considerations for the public and profession, cost analyses in terms of the benefits derived versus the costs involved, conflict resolution, police power, discipline, competency assurance, mediation, and above all, an attempt to protect the public.

There is a built-in premise that a license is necessary to promote proficiency and maintain standards in a profession. In and of itself, licensure cannot guarantee the public’s protection nor the competency of the licensee. It merely indicates that an individual has met the initial requirements of education, experience, minimal competence as measured by an examination, or a combination of the three. Continued competence, not just continuing education, is rarely required to be demonstrated and a licensee’s ethics and morals are generally evaluated only when the potential for disciplinary action is being considered. Granted, a number of professions require an individual to possess “good moral character” at the time of
licensure, yet the meaning of this term is often nebulous. With the exception of a criminal conviction, good moral character is rarely used as grounds for the denial of a license.

The public relies upon the credentials of an individual to evaluate whether a practitioner is competent. And yet, is this an accurate method by which to judge someone who will have a direct physical, emotional, or financial impact on one’s life? Carl Rogers (1973), past president of the American Psychological Association, would claim that reliance upon a license to judge a professional should be used only if additional information about that person’s competence is available. Although Dr. Rogers’s comments reference certification, the same sentiment could apply to licensure.

If you had a good friend badly in need of therapeutic help and I gave you the name of a therapist who was a Diplomate in Clinical Psychology, with no other information, would you send your friend to him? Of course not. You would want to know what he is like as a person and as a therapist, recognizing that there are many with diplomas on their walls who are not fit to do therapy, lead a group, or help a marriage. So, certification is not equivalent to competence. (Rogers, 1973, p. 382)

As Dr. Rogers points out, there is more involved in ensuring public protection than simply hanging a license on a wall.

Historical Perspective

How did licensure evolve? The first attempt to regulate any professions may have been the tariff imposed on medical practitioners in the year 2000 B.C. (Gross, 1984; Hogan, 1979; and Young, 1987). The Babylonian Code of Hammurabi stipulated both surgeon’s fees and penalties for what is now considered malpractice. According to historical writings, one such penalty was the severing of a surgeon’s hand when an operation resulted in a patient’s death. The restrictions on women practicing certain professions dates back to 300 B.C. when the laws of Greece specifically barred women from medical practice.

In the 13th century, the king of Sicily established the foundation for current licensing laws by implementing standards to control the medical profession. Prior to becoming recognized as a medical doctor, an individual had to have completed 3 years of philosophy, 5 years of medicine, and 1 year of practical experience, and must have passed an examination prepared by a medical facility. Practicing without a license was prohibited. The law also established fee schedules, mandated that free service be available to indigents, established ethical codes with strong penalties, and made it unlawful for a physician to own an apothecary.

During the later 13th through middle 15th centuries, various professional Guilds were established throughout Europe. Although the initial Guilds had fairly lax requirements, eventually they became quite restrictive in their membership by means of imposing stringent requirements, similar to today’s licensure requirements. Guilds required compulsory membership; high entrance fees with approval of other members before a new member could be admitted; a period of apprenticeship (up to 7 years in some instances); a limitation on the number of apprentices that
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a member might have; and the establishment of minimum prices for services and a maximum wage for workers. The Guilds started to disappear during the 15th century because a more laissez-faire system became dominant plus there was an increase in the economic market and general accumulation of wealth.

The first actual licensing law, comparable to those of today, involved medical doctors and was enacted in England in 1511. Three classes within the medical field were licensed—physicians, surgeons, and apothecaries. Battle lines were drawn with the physicians feeling they were the superior group and attempting to reduce the size of the other two professions. The Apothecaries Act of 1815 gave the Society of Apothecaries the right to examine and establish standards for those wishing to become apothecaries. It also established penalties for individuals who practiced medicine illegally. Unfortunately, the enforcement powers of this act were not very extensive and regulatory efforts were quite weak.

Finally, the Medical Act of 1858 merged the three professions and led to the enforcement of uniform standards in the examinations. It also provided for the creation of a list of licensees and only those on the list could sue for medical fees or hold public office. The law did not, however, forbid the practice of medicine by lay persons.

The earliest licensing laws (medical profession) in the United States were enacted by Virginia in 1639, Massachusetts in 1649, and New York in 1665. The Virginia law was created as a result of numerous complaints about the fees charged by the medical profession. The Massachusetts law was intended to regulate activities of:

“Chirurgeons, Midwives, Physicians or others [who were] employed at any time about the bodye of men, women or children, for preservation of life, or health.” No such persons were to practice “without the advice and consent of such as are skilfull in the same Art (if such may be had) or at least some of the wisest and gravest then present”. If these rules were not obeyed, violators were subject to “such severe punishment as the nature of the fact may deserve.” (Shryock, 1967, p. 1)

Although the above language may give the appearance that the regulation was intended to protect the public from harm, the prevailing reason for medical licensing may have actually been unrelated to a concern for competency. During the early days of regulation, the colonial laws and court actions were generally more concerned with fees than with the quality of service provided.

Virtually no further legislation regulating the medical profession, or any other profession, occurred until the mid-1700s at which time a number of other states instituted legislation to regulate medical doctors as well as lawyers. During the next 100 years (until the mid-1800s), many states enacted regulatory legislation and then eliminated the legislation due to conflicts between whether graduation from a “chartered” school was sufficient for licensure or whether additional requirements were necessary.

By 1850, the practice of medicine in the United States was available to almost anyone who desired to perform the tasks associated with medicine. Only New Jersey and the District of Columbia had a law in 1850 that even resembled regulation of the medical profession. One reason for deregulation was that the
education of medical practitioners was perceived to be so much greater than it had been when the laws were first established. Also, the medical facilities were effective in convincing the legislators that training standards were being met. The same was true for the legal profession. In fact, nearly two-thirds of the states had abolished all regulation of lawyers by 1840 and many states were even contemplating the abolishment of the legal profession in its entirety.

The attitude of state legislators concerning the necessity for regulation changed again in the late 1800s. State medical societies were becoming increasingly distressed with the lack of standards and the poor quality of many emerging proprietary schools. In an attempt to force change, the individual state societies formed the American Medical Association, which was finally able to make an impact on the need for regulation. Texas was the first state to pass a law establishing a state examining board. Following the Texas action in 1873, states began re-instituting medical licensing boards and enacting regulatory legislation. By the end of the 19th century, 37 states regulated the medical profession. New Hampshire was the last state (1915) to license the profession (The Council of State Governments, 1952, p. 80).

Present Status of Licensure

During the first half of the 20th century, licensing laws were primarily limited to those professions having a direct relationship to public health and safety. The basic premise was that most consumers of services provided by health care practitioners could not judge adequately the quality of the care provided. Following the enactment of regulation for a few professions on the basis of this premise, the need for “public protection” quickly became a convenient, but effective, argument for every group seeking regulation.

Milton Friedman (1961) references a study indicating that “occupational licensure is by now very widespread....and by 1952, more than 80 separate occupations ... had been licensed by state law” (p. 139). He must be aghast at how widespread occupational licensure is now. In 1968, the median number of professions licensed by states was 37, ranging from 25 in Washington to a high of 57 in Michigan (The Council of State Governments, 1968, p.1). A 1986 report by the American Association of Retired Persons estimated that there were at least 800 professions licensed. According to a 1990 publication, states collectively regulated over 1,000 professions, yet fewer than 60 professions were regulated by all or most states (Brinegar, 1990).

It is probably impossible to know exactly how many professions are actually regulated because of the various ways in which the data are collected and analyzed. Regardless of whether the above figures are completely accurate, it is clear that an “overwhelming” number of professions are regulated by states.

For approximately 60 professions (i.e., Medicine, Nursing, Engineering, and Architects) comparable licensing requirements exist in all states, the District of Columbia, and many of the U.S. territories. For most professions, however, the regulation of occupations and professions varies among the states. Some of the more unusual professions regulated in at least one state include: Babcock testers,
bankruptcy salespersons, wire rope inspectors, lime vendors, mussel fishers, pheasant club operators, safe mechanics, apprentice scalers, resident and non-resident sea moss rakers, tree injectors, weather modifiers, livestock weighers, lightning rod installers, hemp growers, endless chain agents, and egg brokers (Brinegar, 1990). What individuals in these occupations actually do and why regulation is needed may not always be comprehensible.

In the immediate past, the emphasis was on licensure, licensure, and more licensure without the appearance of much regard for whether the laws were necessary to protect the public from harm or quackery. Any profession that could get the support of a senator or representative had an excellent chance of obtaining licensure status. In fact, licensing legislation may have been based not so much on logic, but rather on who introduced the bill, who the lobbyist was, and how much financial backing was available.

In the 1950s an ill-conceived licensure bill was introduced into the California legislature. The proposed legislation required licensure for anyone, including children, who mowed lawns for money. The penalty for noncompliance would have been a fine up to $500 and imprisonment for up to 6 months. Fortunately, this bill failed to win support by the legislature as it definitely would not have been in the public’s best interest. Such legislative foresight has not always been apparent as evidenced by the previous noninclusive list of questionable regulation.

One reason for the increase in regulation during the 1970s and 1980s may have been the growth of allied health professions. These professions alone did not, however, account for the rapid rise in professional and occupational regulation during the last 40 years.

During a series of four regional workshops conducted in 1975, the following comments were made by some of the legislators who attended. Based on their comments, these legislators were cognizant that requests for licensure are not always based on public protection. Similar views may not have been held by other legislators as the proliferation of licensing laws continued for the next 15 years.

We have been besieged, as have most legislative bodies, by requests from groups for additional licensure. All kinds of groups are coming to us requesting that they be given the right to license....obviously the only way the legislation could proceed [is] if there was some public interest at stake.

Another big problem is this proliferation that we are running into. Everybody wants to be licensed or certified. Don’t kid yourself—they want it because it is a status thing, and we’re fighting them as hard as we can.

New licensing—those who would like to be licensed—shocks me. When I came into this arena I could not believe that everyone in the country felt they needed a license. The stack of licensing bills I have is so high you wouldn’t believe. I

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2Ben Shimberg, a leading authority in regulation, coordinated these four regional workshops. The purposes for these conferences were to (a) determine problems and issues related to regulation; (b) ascertain the interest of state officials to participate in cooperative projects aimed at resolving these problems; and (c) develop strategies which would help bring about needed regulatory change. Nearly 100 individuals from 30 states attended these meetings. Various comments expressed by the participants are included in this chapter.
personally do not see the need for it. I don’t think it means better service to the people of our state.

Nobody has defined which things should be licensed and which shouldn’t. Where do you draw the line? Which are valid public purposes and which are simply for the aggrandizement of a particular group? (Shimberg, 1976, pp. 11–12)

The enactment of new licensing laws appears to have slowed during the last few years even though the number of licensure bills continues to flourish. In some states, the decline in the number of newly licensed professions may, unfortunately, be based more on budgetary reasons than on the legislators’ thorough understanding of when licensing laws should or should not be enacted.

The stated purpose for licensure is public protection and yet licensure laws have rarely been enacted as a result of the public’s outcry that they were being harmed. It is not the public demanding the enactment of these laws, but rather the professions themselves who spend thousands of dollars on lobbyists to ensure that “their” bill is passed. According to Linda McCready, “a good lobbyist can do more for the interest of a profession than years of national conventions can” (1982, p. 74).

Legislative decisions regarding licensure are generally made with little or no input from the public. On the other hand, members of a profession seeking licensure are always well represented. “Of course, they are more aware than others of how much they exploit the customer and so perhaps they can lay claim to expert knowledge” (Friedman, 1962, p. 140). The legislative process may, at best, only coincidentally serve the interests of the public. According to Milton Friedman (1962),

The declaration by a large number of different state legislatures that barbers must be approved by a committee of other barbers is hardly persuasive evidence that there is in fact a public interest in having such legislation. Surely the explanation is different; it is that a produce group tends to be more concentrated politically than a consumer group. (p. 143)

The principal argument offered by professions seeking licensure is that the public is incapable of determining or judging whether a practitioner is competent. This argument may be appropriate in some instances, but not in all cases. Shimberg (1991) states that “virtually all licensing laws have been passed at the behest of the occupational group to get certain benefits for their members, and, [only] incidentally, to help the public” (p. 1). In addition to the main argument offered in their attempt to secure licensure status, there are a number of other reasons why professions actually seek regulation. Members of professional associations believe that licensure will:

1. Lead to enhanced economic benefits;
2. Provide practitioners with increased status;
3. Protect the reputation of the profession;
4. Provide a symbol of respectability;
5. Demonstrate that the profession is well established;
6. Define the professional field more clearly;
1. WHAT IS LICENSURE?

7. Provide for the payment of services by third-party payers; and
8. Control the number and geographic distribution of practitioners.

Although there is nothing inherently wrong with the first seven licensure outcomes, they should not serve as the principal reasons for seeking or being granted licensure status. Controlling the number and geographic distribution of practitioners, however, should never be the purpose for or the intended result of licensure.

Critics claim that licensure serves only the interests of a specific group by enhancing their status and limiting competition which improves their economic position. Unreasonable restrictions on job entry and mobility impact negatively upon the availability, quality, and cost of services.

In the past, anticompetitive regulations were viewed by legislators and the public as being "essential to ensure high professional morality and performance" (Blair & Rubin, 1980, p. vii). As exemplified by the following statement, this view is no longer being accepted by the public: "A gullible public was taken in by the propaganda about protecting consumers from cheats and incompetents. Now consumers are beginning to see that they are being forced to pay a very high price for protection of dubious value" (Shimberg, 1976, p. 46).

Sunrise

In an effort to better ensure that new regulation of additional occupations and professions is for the benefit of the public rather than solely for the profession, a number of states have implemented Sunrise legislation. Sunrise is a legislative process applying specific criteria to evaluate the appropriateness of the requested new regulatory legislation.

Typically, professional groups or associations draft legislation providing for the regulation of the profession and then attempt to convince the legislature of its necessity. Under the Sunrise process, the legislature, a legislatively enacted body, and/or a designated administrative body review the applications for regulation to determine whether licensure, or another form of regulation, should be granted. Restricting the number of new licensed professions is viewed by the proponents of Sunrise to be more effective than trying to eliminate those already in existence.

The first Sunrise legislation was enacted by Minnesota in 1973 and dealt exclusively with the regulation of allied health personnel. Since that time, 17 states have implemented formal Sunrise reviews of proposed regulation. States that have formal Sunrise legislation are indicated in Table 1. Many other states, particularly those with central agencies responsible for overseeing the administrative components of regulation, have instituted similar reviews of proposed legislation even though there is no mandate to perform this task.

Shimberg and Roederer (1994) have suggested that all legislators, particularly those who do not have a formal Sunrise process, consider carefully the answers obtained from asking the following questions of occupations or professions who wish licensure status:

1. What is the problem?
2. Why should the occupational group be regulated?
3. What efforts have been made to address the problems?
Table 1. Sunrise and Sunset Legislation By State

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1. WHAT IS LICENSURE?

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1Information was obtained through an informal telephone survey conducted by CLEAR in October, 1993.

2Sunset Legislation was repealed in 1993

4. Have alternatives to licensure been considered?
5. Will the public benefit from regulation of the occupation?
6. Will regulation be harmful to the public?
7. How will the regulatory activity be administered?
8. Who is sponsoring the regulatory program?
9. Why is regulation being sought? (pp. 25–33)

In addition to these questions, legislators should also make certain that each of the following conditions exists before regulation is enacted.

1. Clear evidence demonstrates a significant danger to the public’s health, safety or welfare by the unregulated practice.
2. A scope of practice can be clearly defined and includes acts, tasks and functions related to demonstrable skills and the acquisition of a substantive body of knowledge.
3. Professional practice is done independently with little or no supervision by presently licensed individuals or agencies.
4. The cost of regulation will be reasonable and the resultant impact of regulation on the cost and availability of services will be minimal compared to the protection afforded the public.
5. Expanded availability and/or a lower cost of service will occur and are in the public’s best interest.
6. Assistance is required for the public to differentiate between qualified and unqualified practitioners or the public is unable to differentiate among professional titles where similar services are provided.
7. Unnecessary barriers to entry will not be created.
8. The efficient use of auxiliary or paraprofessional personnel will not be adversely affected.

9. Evidence exists that the public cannot be protected effectively through other means.

If most of these conditions do not apply to a profession seeking licensure, the proposed regulatory bill should be defeated or less restrictive regulation enacted. Sunrise, or any type of preregulation legislative review, will lose its effectiveness if a careful analysis of these, and other, issues is not performed.

Sunset

In an attempt to overcome unnecessary, outdated, or inefficient regulation, a number of states have instituted Sunset legislation. Sunset is the formal legislative review of regulation that currently exists as opposed to the review of proposed legislation. William O. Douglas, Chairman of the Securities and Exchange Commission under Franklin D. Roosevelt, is credited with the idea for a Sunset-type approach to legislative oversight. His proposal was that federal agencies should be abolished after 10 years (Kearney, 1990).

Colorado was the first state to adopt a Sunset Law in 1976. Two comments from participants at the 1975 workshops directly relate to the tasks performed by Sunset Review:

... establish a review process so that “deregulation” or program modification would take place when the need for regulation ceased to exist or when the program was not fulfilling its public purpose in an acceptable manner. (Shimberg, 1976, p. 11)

The objectives of regulation [should] be stated as precisely as possible at the time each regulatory law is enacted. The extent to which these goals were met would constitute the major basis for deciding whether or not the regulatory law should be continued. (Shimberg, 1976, p. 16)

Sunset was promoted as a way to eliminate unnecessary agencies, curtail the proliferation of rules and regulations, and force greater accountability. The process has been used to evaluate not only licensing boards and functions, but all agencies of the executive branch within a state. Sunset requires legislators to evaluate the existing laws, rules, and operations of agencies and determine whether they are in the public’s interest and should be continued, modified, or eliminated. Sunset legislation also mandates that an agency and its regulatory activities cease to exist on a specified date unless the legislature takes affirmative action to continue the existence of the agency (regulation) by enactment or replacement with a new statute.

In general, Sunset reviews focus on the following questions:

- Is the regulation needed to protect the public interest?
- If it is needed, is the current regulation effective?
- If it is not effective, can it be improved?
- Is the current regulation unnecessarily restrictive and, if so, how could it be revised? (Douglas, 1988)

Based on the answers to these questions, agencies and the regulation of certain professions may be eliminated or revisions made to the corresponding laws and
1. WHAT IS LICENSURE?

rules. Administrative procedures may also be revised based on a Sunset review. In some instances, a professional board itself may be discontinued, but the regulation is continued under a different administrative structure. In rare instances, professions might be combined so that future decisions are made by a joint board composed of members from the various professions. Regardless of the outcome, the Sunset process provides an impetus for reform and requires legislators to focus on problems and issues that face the public, a profession, and the agency overseeing the profession.

Sunset is intended to promote and provide for an open, apolitical structure in which reform and improvements can be made to the regulatory operations. Unfortunately, this has not always occurred as evidenced by events that took place in two states—Colorado in 1981 and Texas in 1993.

Starting in 1978, the State Board of Registration for Professional Engineers and the Colorado Department of Regulatory Agencies, the central agency responsible for administration of this and other boards, became embittered in numerous confrontations centering on personnel matters and policy issues. At one point, the Board sued the Department Director and later drafted legislation that would have eliminated the entire Department. As might be anticipated, there was a lot of mutual suspicion and resentment as well as a lot of political maneuvering when the Sunset Review for Engineers was initiated in 1981.

The Colorado Engineering Council ... worked extensively on sunset and appointed a standing committee that drafted its own bill, obtained its own sponsors and basically shut the Department out of the process. We were not invited to the meetings, our requests to participate were refused and so on. The profession clearly decided that they were going to do it their own [way] using their political influence in the legislature and not deal with the Department, which still had the responsibility under Colorado law for framing recommendations to the legislature and performing the actual review and report on the need for regulation.

It became apparent that a bill was going to be introduced, which the Department had never even seen or had access to, and we felt that this would result in a complete end run around the sunset process, setting a dangerous precedent for the future of sunset. (Douglas, 1988, p. 7)

In an effort to counteract the secret bill being drafted on behalf of the engineers, two employees of the Department drafted their own secret bill, recruited a senator to sponsor the bill, and convinced the attorney doing the legislative drafting of the engineers’ bill to set it aside and provide a quick 2–day turn–around on the Department’s bill. The second bill was calendared for a hearing during the first week that the senate reconvened, much to the amazement of the engineers. Battle lines were quickly drawn and confusion reigned. The engineers were forced to testify against the Department’s bill even though it would have continued the regulation of the profession. The Department’s bill was finally postponed, without a vote, once the lobbyists figured out the strategy behind it.

Eventually, the two organizations were able to reach a compromise during this confrontational initial Sunset review. When the State Board of Registration for Professional Engineers was reviewed again in 1988, the two organizations worked in a cooperative and supportive atmosphere. According to Mr. Douglas, the lesson
learned during the initial review was that "both sides should try to put themselves in the other's shoes, should learn to live with each other and respect our differences" (Douglas, 1988, p. 10).

Confrontations have not been restricted to the early days of Sunset review. Two similar conflicts occurred during the 1991–1993 Sunset review process in Texas.

Sunset review in Texas is conducted by a Sunset Advisory Commission composed of eight legislators and two public members. Between 1991 and 1993, the Commission was responsible for reviewing 30 agencies, including 20 licensing boards. During the most recent review, the legislature nearly passed a measure to wipe out the commission itself because of disagreements over some of the recommendations. According to an editorial in the Houston Post,

The major argument legislative leaders have used in advocating the commission's demise is that the sunset process has allowed special–interest lobbyists to gain too much influence. But that is not the fault of the commission. The blame belongs to the Legislature, which rejects too many commission recommendations and too often does the bidding of lobbyists. (Paxton, April/May 1993, p. 4)

Eventually a compromise was reached with the creation of a panel to study thoroughly the responsibilities and authority of the commission. A report is to be presented to the Texas legislature in 1995.

In another instance, conflict among the profession, legislature, and the Sunset Advisory Commission caused the dentists and dental hygienists to lose their licensing board on August 31, 1994 because the legislature adjourned without reauthorizing the board. The scheduled Sunset (expiration) date for the board was four months before the legislature would reconvene unless a special session was held. The governor, upset with the actions of the Dental Association, ensured that a special session to handle this issue was not held. The Texas Dental Association had actively lobbied the legislature to vote against the reauthorization bill because they did not like some of the recommendations. These included a recommendation that the governor appoint the chairperson of the dental board; the Dental Association wanted the chairperson to be appointed by the dental board itself or require the governor to appoint a dentist rather than a public member.

The other area of conflict evolved around the governor being granted the authority to appoint three persons of a six–member internal board to oversee dental hygienists. Under the previous structure, there were eight members on the internal board and all were appointed by the dental examiners. No action could occur regarding this recommendation, or the previous one, until the board was reauthorized (Paxton, April/May, 1993).

Finally, after a lawsuit was brought against the Dental Board and the State of Texas, the legislature reauthorized the Board of Dental Examiners on February 6, 1995, with an effective date of March 1, 1995. The legislative action occurred just three days prior to the deadline imposed by the State District Judge. Had the legislature failed to reconstitute the Board, the Judge would have ruled the Dental Practice Act as being unconstitutional and the licenses of all Texas dentists and dental hygienists would have been invalid.
Ironically, in spite of the various confrontations, including the one between the commission and legislature, 19 significant across-the-board recommendations were approved by the legislature for the 30 agencies reviewed. An additional 10 general recommendations were approved for 20 agencies with licensing functions and a multitude of specific changes were implemented for each of the individual licensing boards. Even with the contentiousness surrounding the Sunset review, 1993 was one of the most reform-filled years for Texas licensure.

When Sunset was first introduced, the concept was heralded as a major step forward in revising, revamping, and improving the regulatory process. Between the years of 1976 and 1982, all 50 state legislatures as well as Congress considered the adoption of Sunset laws. By the end of 1981, 36 states had adopted Sunset. Since then, there has been no new Sunset legislation and as of 1993 only 22 states had retained Sunset legislation. Two states, Florida and Georgia, repealed their legislation in 1993. (Refer back to Table 1 for a list of states with formal Sunset reviews)

North Carolina was the first state to repeal Sunset (1981). Since then, Arkansas, Mississippi, Nebraska, New Hampshire, and Wyoming have also repealed their Sunset laws; Illinois, Montana, Nevada, Rhode Island, South Dakota, and Connecticut have allowed Sunset to become inactive. With the exception of Illinois, most of the dropout states have “part-time legislatures with low levels of professionalism, low salaries, low staffing levels and below average spending on the legislative institution” (Kearney, 1990, p. 55). A number of states, including California, Michigan, New Jersey, Ohio, and Wisconsin, have included Sunset clauses in selected programs although they have never adopted broad Sunset legislation.

Why the change from eager acceptance to disenchantment? One of the reasons is that wide-spread elimination of licensing boards or other agencies did not occur as anticipated when Sunset was first introduced. Although there have been many reforms and improvements, as evidenced by Texas’ most recent review, professions with strong lobbying and financial backing have managed to escape elimination or major modification that could have resulted from the reviews. The most frequently cited problems with Sunset are:

(1) failure to reduce the size of government; (2) high temporal and monetary costs of the process for legislators and staff; (3) lack of meaningful citizen participating and the disproportionate influence of agencies and their lobbyists; and (4) lack of adequate evaluation criteria to apply to agencies under review. (Kearney, 1990, p. 51)

Regardless of the problems associated with Sunset, when implemented properly, significant benefits have been achieved. Sunset has resulted in (a) an improvement in agency structure, procedures and performance (more efficient methods for investigating and disciplining practitioners); (b) enhanced agency accountability (better management of the agency); (c) a closer alignment between regulation and public interest (inclusion of public members on boards) and (d) financial savings to consumers (elimination of restrictions on open competition). Even in those states that repealed Sunset, the process was relatively effective in terms of its impact on state agencies.
Montana terminated five agencies ... and implemented over 150 modifications. Connecticut scored 29 terminations, Arkansas 28, Rhode Island 17 and New Hampshire 15. Illinois eliminated more than 50 agencies before pulling the shade on Sunset. (Kearney, 1990, p. 55)

Licensure versus registration and certification

Although this chapter is entitled, “What is Licensure?”, it is important to mention that two other forms of regulation exist with licensure being the most restrictive. Unfortunately, many people use the term licensure to reference all forms of credentialing3 rather than just to mean title and practice protection. The frequent misuse of the term adds to the confusion already surrounding the actual definition of licensure.

Licensure, certification and registration can each be conferred upon individuals and institutions by states. Certification is, however, more traditionally considered a voluntary mechanism implemented by a nongovernmental entity for the purpose of recognizing more advanced or specialized skills. Certification is frequently granted to individuals who specialize within a profession such as medical doctors who are certified as Neurologists, Pediatricians, or Obstetricians. Specialists often indicate that they are “Board Certified”, which simply means they have met the requirements of a state or, more frequently, private agency. Licensure, on the other hand, is mandatory and must be obtained from state government in order for individuals to practice specified occupations or professions.

These distinctions, however, are not always accurate and as mentioned previously, certification may be used by states at the entry level. Even the legal use of these terms can create confusion; “Registered” Nurses are actually licensed as are “Certified” Public Accountants. In a number of instances, one of the entry requirements for licensure includes passing an examination offered by a private certifying agency. Michigan, and a few other states, require dentists who specialize in only one field of dentistry (Prosthodontics, Oral Surgery, Periodontics, etc.) to be state certified in their specialty as well as to remain licensed as general dentists.

Registration provides, at most, title, rather than practice, protection. That is, unregistered individuals can perform the same functions as those who are registered provided that they do not use a designated title. Registration would be appropriate when the “threat to life, health, safety, and economic well-being is relatively small and when other forms of legal redress are available to the public” (Shimberg & Roederer, 1994, p. 5). In its basic form, registration merely requires individuals to “register” their names with the appropriate state agency. Minimum entrance requirements or practice standards are typically not established for the profession.

Certification is also title protection and grants recognition to individuals who have met predetermined requirements. Noncertified individuals may offer similar services to the public provided they do not describe themselves as being “certified”

3Credentialing is a generic term that subsumes licensing, certification, registration, and institutional licensure by the states, as well as standards of competence where no licensure is required and certification by private organizations where it is required for practice by reference in state law. (McCready, 1982, p. 74)
or hold themselves out as someone who is certified. For instance, dentists may practice as pediatric dentists in Michigan without being certified provided they do not call themselves pediatric dentists or indicate that their practice is limited to this specialty.

A precise distinction among registration, licensure, and certification will probably never be achieved because of the way in which the meanings of the terms have been interchanged. Table 2 is provided to assist in understanding the two factors—mandatory versus voluntary and competency standards versus no competency standards—that are generally employed in the definition of the terms. Competency standards include specified education, experience, and/or examination requirements prior to licensure.

Table 2. Distinction Among Registration, Certification and Licensure

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<th>Competency Standards</th>
<th>No Competency Standards</th>
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<tbody>
<tr>
<td>Mandatory</td>
<td>LICENSURE</td>
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<tr>
<td>Voluntary</td>
<td>CERTIFICATION</td>
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Critics of licensure are also critical of certification and believe that neither form of regulation accomplishes the stated goal of public protection. Rather, both mandatory licensure and voluntary certification are viewed as self-serving to those who are able to meet the imposed standards. According to Hogan (1979), “associational policies tend to promote precisely the same harmful effects of licensure [restricting the supply of practitioners; decreasing mobility; increasing the cost of services, etc.] although their effects are probably not as pervasive” (p. 336).

Competency Examinations

Whether individuals are licensed by a state or certified by a private association,4 everyone has to demonstrate competency by passing an approved examination prior to being granted a license or certificate. An individual may have been administered an oral, written, or practical examination or any combination of these examination formats. Regardless of the adherence to standards and quality assurance, examinations are often viewed by candidates as unnecessary, tricky, and inappropriate barriers to practice.

In 1961, John Gardner, Secretary of Health, Education, and Welfare during the Johnson administration, made the following statements about tests. Although he was not specifically referencing credentialing examinations, the sentiments expressed are nevertheless applicable.

The fact that tests may have high statistical reliability and validity does not quiet the apprehension over their use. ...Apprehension is fostered by the fact that it is very hard for those without professional training in psychology to understand the process of mental measurement. No one wishes to be judged by a process he cannot comprehend. ...there is not only fear of the tests but fear of the unknown bureaucracy that handles the test and acts on the results.

4There are a number of registered professions that do require an examination, although this situation is not typical.
No one concerned with the future of testing can afford to ignore these sources of anxiety. On the other hand, even if these sources of concern were to disappear, the hostility toward the tests would probably remain. *The tests are designed to do an unpopular job.* ...As the tests improve and become less vulnerable to present criticism, the hostility to them may actually increase. A proverbial phrase indicating complete rejection is “I wouldn’t like it even if it were good.” With tests, the more appropriate phrase might be “I wouldn’t like them especially if they were good.” (Gardner, 1961, pp. 47–48)

During the 30 plus years since Mr. Gardner’s comments, tests have definitely improved and the hostility towards them has definitely not lessened. Tests will not disappear as they are an essential component of ensuring initial competence. Enhancements to test development, administration, and scoring have been and will continue to be made. The remaining chapters in this book detail where we have been, where we are now, and where we are going with examinations.

Federal Involvement in Licensure

According to the Constitution of the United States, states have the authority for establishing requirements for and ensuring compliance with occupational and professional regulation as an exercise of their police power. Prior to the 1970s, with the exception of the mandate for states to license Nursing Home Administrators, the federal government viewed state regulation in this area with, at most, a passive interest. However, in 1971 and again in 1973, the then U.S. Department of Health, Education, and Welfare (HEW) recommended that states observe a 2-year moratorium on legislation establishing new licensed health care personnel.

Ironically, however, at the same time a moratorium was being urged, the federal government imposed a requirement that health care reimbursement could only be paid to providers who were licensed by a state or certified by an approved national organization. Contradictory messages, such as this, have caused state legislators and regulators to question whether the federal government accurately understands the statutory responsibilities of states in terms of deciding who should be regulated and how it should be accomplished.5

In 1977, the HEW issued a report entitled "Credentialing Health Manpower" which urged the adoption of national standards to be developed jointly by states and professions with limited involvement by the federal government. In fact, the following position was taken by HEW.

> It is important to emphasize that the development and adoption of national standards should not be confused with federal licensure. Licensure is presently, and will continue to be, a function of state government. (p. 11)

Various publications by the Office of the Inspector General, Department of Health and Human Services during the late 1980s continued to emphasize that licensure is a function of states, yet federal actions seem to convey a different attitude. It is beginning to appear that the states’ traditional responsibility for the

5There are a number of professions regulated at the federal level (airline pilots or coast guard masters), but the regulation of these individuals has been retained by various federal agencies and states have not been told to assume responsibility for the professions.
licensure and regulation of professions is being slowly eroded by the intrusion of federal action.

Although it is true that some action taken by the federal government has improved states’ regulatory efforts, this has not always been the case. In a number of instances, regulatory actions taken by the federal government appear to have been predicated on monetary issues (third party payments; Medicare or Medicaid funding) rather than on the need for better public protection or improvements in the quality of service delivered.

Perhaps part of the reason for increased federal involvement is that they perceive states as not meeting the needs of the public. Often the laws of politics resemble the laws of physics. If a vacuum exists, something or someone will intervene to fill the void. The federal government’s apparent perception that states are unable to enact or enforce essential regulatory programs, whether due to insufficient resources, insufficient collaborative efforts, or a lack of will on the part of states, has fostered increased federal involvement in regulatory activities (Schmitt, 1989, p.33). The Congress may perceive that they are being responsive to their constituents by instituting regulatory mandates on states. But is the public demanding the regulation or are lobbyists for various organizations starting to apply pressure on congressmen in the same way they have been applying pressure on state legislators?

In terms of federal legislation, several major laws have been enacted that have created a financial and staffing burden on states. One of these laws, the Omnibus Budget Reconciliation Act of 1987 mandates that states evaluate the competence of nurse aides employed by nursing homes, establish mandatory training, maintain a register of those who pass the required examination, establish a mechanism for handling complaints, and restrict practice if aides are found guilty of abuse, neglect, or theft.

The actual implementation date of this requirement was pushed back on several occasions because the federal government failed to recognize fully the impact the law would have on states. When the legislation was initially enacted, it created a frenzy of activity and innumerable headaches as states attempted to implement overly vague or overly specific requirements. The language included in this Act exemplifies the concept of micro-management. The Act specified the state agency to regulate nurse aides (at least 11 states fought this requirement and won) and placed a prohibition on states from collecting any registration fees from nurse aides. Although the legislation provided no assurance that the quality of care would be raised, it did raise the costs incurred by nursing homes and subsequently by patients.

It is interesting to note that once an individual’s name is placed on the register, there is no requirement to remove the nurse aide’s name following disciplinary action. An aide found guilty of abuse, neglect, or theft of a resident’s property can, however, never work in a facility receiving Medicare or Medicaid funds. Thus, the aide remains registered, but cannot work. Another unique aspect of the legislation is that nurse aides who work in hospitals are not required to be registered. Many hospitals have, however, established their own requirement that an aide must be registered before being hired. Nurse aides who work in home health care
organizations are not required by the federal government to be registered, but they are required to have the same training and pass the same competency evaluation required of aides who must be registered.

Two companion legislative acts, the Health Care Quality Improvement Act of 1986 and the Medicare and Medicaid Patient and Program Protection Act of 1987, were intended to initiate and then expand upon a National Practitioner Data Bank (NPDB). The concept behind the creation of a data bank was excellent; the manner in which the data bank was implemented was less than what many had hoped for. The first set of proposals to administer the data bank, submitted in 1987, were all rejected because there was no appropriation of funds for the NPDB. The contract was bid twice due, in part, to the funding problems. Multiple delays were necessary before the NPDB was finally implemented on September 1, 1990. Initially, only medical doctors and dentists were to be included in the bank; then legislation was created so that most health care providers would be included; then a decision was made that funding was unavailable for such a massive project. Presently, the data bank contains information only on medical doctors and dentists.

Since the NPDB was made active in 1990, there have been continual complaints about the manner in which information is obtained, the cost of retrieving information, the threat to privacy and due process, as well as the lack of accessibility of information to the public. It should be noted that the NPDB contains a report on any payment made in response to a claim by a patient which is causing considerable controversy about the data bank. In fact, during the 1993 meeting of the American Medical Association, members voted to seek the abolition of the NPDB. As part of his health care reform initiatives, President Clinton has, however, called for public access to the bank regarding practitioners with repeated reports.

The 1989 Savings and Loan Bailout Bill included a section mandating that states license two different classes of real estate appraisers. The argument for incorporating this requirement was that poorly trained and unqualified appraisers were partially to blame for the Savings and Loan fiasco. States had to have a licensure mechanism in place by July 1, 1991 (subsequently delayed for 6 months). The oversight responsibility for this mandate was given to The Appraisal Foundation, a non-governmental, national appraisal organization. The licensing requirements (education and experience) were dictated to the states and any examination used not only had to adhere to the required test specifications (not based on generally accepted testing standards), but also had to be approved by a private testing organization selected by the Appraisal Foundation. New classifications of appraisers and expanded requirements for initial and continuing licensure, with which states will have to comply, are currently being proposed by the Foundation. According to a September 10, 1993 proposal to revise the appraiser qualifications criteria, the justification cited for these changes is the need to elevate appraisers and appraisals to a professional level. The suggested revisions appear to be based on professional need rather than public need.

The Americans With Disabilities Act (ADA) of 1990 has also affected the manner in which state regulatory agencies function. The ADA requires that facilities used by agencies be able to accommodate the disabled, that all documents
1. **WHAT IS LICENSURE?**

Prepared by agencies include a telecommunication device for the deaf (TDD) phone number, that policies and procedures relating to accommodations for the disabled be developed, and that test administration accommodations be made available. In the latter instance, most states, particularly those with centralized testing divisions, were providing necessary accommodations prior to the enactment of the ADA.

The requirements of this Act are, in general, reasonable and accommodations should certainly be made so that disabled individuals are not discriminated against. A number of extensive technical manuals have also been prepared to assist states in their efforts to comply. Nevertheless, there is still considerable confusion as to what is a "reasonable" accommodation versus too little or too much.

Testing personnel, at the state level and with national testing companies, concur that many of the questions they have raised will be answered in court rather than by the Department of Justice. No one at the federal level has been able to answer questions such as "at what point do reasonable accommodations change the validity of an exam?" or "how much latitude do testing agencies have in trying to provide reasonable accommodations for a candidate?" As an example of the lack of assistance provided, a letter requesting clarification as to whether Michigan would be required to waive one section of a validated practical examination (as requested by a candidate) was sent to the Department of Justice in December, 1992. Several years later, the only response was a letter acknowledging receipt of the initial inquiry.

In addition to Congress mandating that states regulate certain professions or report disciplinary action to a central data bank, other federal agencies have become more actively involved in state regulation. The Federal Trade Commission (FTC) has investigated the laws and rules of a number of professions to determine whether they promote an anti-competitive environment. Based on the FTC's recommendations, several professions, either at the state level or nationally, have revised their policies. Although many of the FTC recommendations have been challenged by the respective professions, the eventual implementation of these recommendations has been beneficial to the public.

During the latter half of the 1980s, the Office of Inspector General, Department of Health and Human Services, evaluated the licensure and disciplinary activities related to five or six health professions. The recommendations offered could have been more beneficial had there been different, specific recommendations for each of the professions. Instead, the primary recommendations were the same across all of the reviews.

Future regulatory actions by the federal government are certain to occur. For example, the United States and Canada Free Trade Agreement, as well as the North American Free Trade Agreement, will undoubtedly have a direct impact on the operation of regulatory agencies. If enacted, the health care reform measures proposed by various individuals may also have a significant, yet unknown, impact on regulation.

It appears clear that the federal government, either through Congress or federal agencies, will continue to oversee the operations of states in terms of their regulatory functions. In some instances, this oversight may prove beneficial; in
other instances, it may only create additional work for states without producing demonstrable benefits to citizens.

Future of Licensure

Even though state regulatory efforts may not be optimal and many criticisms about regulatory inefficiency are justified, major improvements have been made in the regulatory arena during the last decade. Boards are no longer composed solely of licensees; legislators are taking a more critical look at the reasons why various groups want regulation; barriers to practitioner mobility are being eliminated; communication among states is being enhanced; unnecessary regulation and requirements are being eliminated; examinations are becoming more valid, reliable, and relevant to practice; and enforcement efforts are being improved. Even with all of these enhancements and improvements, additional changes must take place if licensure and regulation is to better serve and protect the public.

Continuing efforts must be made to clearly and concisely convey to legislators the meaning of and purpose for licensure and other forms of regulation, in order for the haphazard proliferation of occupational and professional regulation to stop. This does not mean that no new regulation should be enacted or that a total deregulation of the 1,000 or so professions should occur. Rather, better communication among all interested parties—legislators, regulators, professions, and the public—should occur so that essential regulation is maintained or enacted and unessential regulation is eliminated or not enacted.

Purpose of licensure. One of the first steps that should be taken is redefining the purpose for licensure. The current justification of “protection of the health, safety and welfare of the public” should be revised so that fewer occupations and professions can claim that they need licensure to accomplish this nebulous goal. A better goal of licensure might be the “protection of the public from imminent or significant threat or harm economically, physically or psychologically.” Although the basic premise for licensure still exists, the intent is more clearly defined.

Legislative evaluations. All state legislatures, and even Congress, need to become more active in their scrutiny of professions that wish to achieve licensure status. Although each and every legislator wants to be viewed favorably by constituents, lawmakers are going to have to make some difficult decisions that, in turn, may anger professional organizations.

The concept of Sunrise, either formal or informal, must be expanded to all states. The prelegislative review procedure must become more critical of the underlying reasons why occupations and professions desire regulation. The questions posed earlier in the chapter, as well as the following guidelines, must be incorporated into the decision-making process in order for legislators to make accurate evaluations of the need for additional regulation.

1. Regulation should meet a public need.
2. Government should provide only the minimum level of regulation.
3. If an occupation is to be licensed, its scope of practice should be coordinated with existing statutes to avoid fragmentation and inefficiency in the delivery of services.
1. WHAT IS LICENSURE?

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

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

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

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

8. The public should be involved in the regulatory process.

9. The regulatory structure should promote accountability and public confidence. (Shimberg & Roederer, 1994, pp. 3–19)

Additionally, consideration must be given to the length of time between each Sunset review. Currently, many reviews are conducted every 5 to 10 years. Although this time frame may be appropriate for some agencies, less standardization in the timing of reviews may be necessary. Agencies that are newly created or that have frequent changes in their laws, rules and practices may need to be reviewed more often than every 5 years. On the other hand, old established smoothly working agencies may need to be reviewed less often than every 10 years.

Restructuring of current laws. Greater attention must also be focused on those occupations and professions currently licensed. Again, formal or informal Sunset reviews need to occur on a periodic basis. If the profession no longer needs to be regulated, deregulation should occur. If changes are needed to the profession’s law and rules, these changes should be made. If administrative improvements are necessary, they should be incorporated.

Situations such as the following should not be allowed to continue. A 1943 Michigan law, as amended, stipulates that horologists (watch makers) must be registered. In the early 1980s, consensus was reached by the profession and the regulatory agency that this law was no longer necessary. During the past 10 years, no entrance examinations have been given, no licensure applications have been distributed or filed, no disciplinary action has been taken, no board meetings have been held, and no list of registrants has been maintained. In essence, the regulation of horologists in Michigan has ceased except for one small problem—the law still exists. In fact, amendments were made to it in 1989 as part of a series of amendments made to other sections of the Occupational Code. Even though there is total agreement on the deregulation of horologists, legislators have not eliminated the requirement from the statutes! Should situations such as this continue to occur, the public may begin to view all forms of regulation as nothing more than a joke.

Entrance requirements. Legislators must also focus on the profession’s entrance requirements included in new or existing regulation. Licensure is intended to ensure that individuals entering a profession possess the minimally acceptable level of knowledge, skills, and abilities necessary to protect the public. It is not the purpose of state government to impose stringent requirements so that only the best can obtain licensure or that only a limited number of individuals can become licensed.
Obviously, professions want their members to be viewed as competent and able to provide quality service, but this does not mean that unrealistic entrance requirements should be implemented. One of the legislators at the 1975 workshops conducted by Shimberg expressed this problem quite succinctly:

I see this all the time. Every year they [licensing board members] come back to raise them [entrance requirements]. I’m not saying the minimum today should be the minimum 50 years from now, but every year they want something more stringent. (Shimberg, 1976, p. 38)

Regulatory boards and agencies must assume a greater responsibility for the development and administration of their examinations. Whether examinations are developed by a board or a central testing agency within state government, or developed by a private testing company, boards are ultimately responsible for the validity and reliability of their examinations. Board members must become knowledgeable about proper testing practices and must devote sufficient time to be certain the examination used to measure competence meets required psychometric standards. Too often boards transfer their authority to an outside testing organization and therefore “assume” the examinations are appropriate. This attitude must change if examinations are to truly measure a candidate’s competency.

Training. Newly appointed board members, both professional and public, must receive adequate training so that they know what is expected of them. They need to recognize that their function on a board is to make decisions that will be of benefit to the public and not just to the profession. This includes an understanding of the level of appropriate entrance requirements as well as appropriate disciplinary action. Both independent boards and central agencies need to devote sufficient funds and time to accomplish the necessary training of new members as well as periodic retraining of current board members.

Continuing competency. In addition to more closely scrutinizing the entrance requirements, greater concern for continuing competency must occur. Reliance on continuing education to ensure competency should be replaced with more accurate periodic assessments of an individual’s competence after initial licensure. Certifying agencies are presently implementing continuing competency requirements for their members and, therefore, may be doing a better job of ensuring continuing competency than are the states. Peer reviews, enhanced course evaluations of knowledge obtained, follow-up evaluations of course participants, practice audits, and even periodic, comprehensive examinations should be required in order for practitioners to retain their license or certification.

There is no question that because of the rapidly changing environment, expansion of new technologies, enhancement of procedures, and the ever-increasing body of knowledge that must be maintained, there is a need for individuals to continually learn. This is true for both the health and nonhealth professions. It is also true that technological changes in some professions are more rapid than in other professions. Accordingly, the format required for continued competency in some professions may be more stringent or require more frequent assessment than would be required in other professions. Continued competency assessment should not be mandated just because it sounds like a good thing to do. (Presently,
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continuing education for some occupations has been instituted just because other occupations have required it and without any other justification.)

Sitting in a classroom for one or more hours does not, however, guarantee learning; it only guarantees attendance. If specific hours of continuing education remain a condition for license renewal, the education must become more than just a classroom experience. Continuing education must evolve into a system that ensures a person has mastered, over the short and long term, the necessary knowledge, skills, and abilities to maintain competence.

Mobility. States must initiate better procedures for ensuring that the incompetent practitioner is unable to cross state lines in an attempt to escape discipline, while at the same time eliminate the unnecessary barriers that restrict the competent practitioner from moving from state to state. Greater communication among the states as well as viable, effective disciplinary data bases are needed. States should license an individual only after obtaining conclusive evidence that no disciplinary action has been taken or is pending against that individual in other states.

States should review their entrance requirements for individuals who have been licensed in another state and eliminate arbitrary barriers that are unrelated to legitimate consumer protection. States need to focus on the competency of the licensee, not on historical minutia. Is it really necessary for an individual who has been in practice for 10 years and who has had no disciplinary action taken to be required to pass an initial licensure examination? Does it really matter if a competent licensee received only 3 hours credit in a particular subject rather than 4 hours?

At the same time, states should avoid the concept of “I’ll license all of your licensees, if you license all of my licensees.” Reciprocity, in the strictest sense, does not really provide for easy mobility of competent individuals. Endorsement, on the other hand, permits a state to evaluate whether the initial licensure requirements in another state were substantially, not exactly, equivalent to its requirements. To further aid in the mobility of licensees, states should work together to establish standards (educational, experiential, examinations and continuing competency) that would be acceptable to ensure competency. Once standards were obtained, there would be more freedom for licensees to practice in different states and not be restricted in where they can work.

As a result of an agreement among the European Economic Community, licensed professionals are now able to practice freely in any of the member countries. Language competency is not required as a condition for reciprocity. The member countries have agreed that meeting the requirements for licensure in one country is sufficient for practice in any of the others. If the various countries in Europe can reduce the barriers across countries and diverse cultures, shouldn’t it be possible to reduce barriers across states?

The Free-Trade Agreement between Canada and the United States has caused a number of the national associations of professional boards to re-examine some of the restrictions placed on licensees who may be interested in practicing in the other country. Both countries are beginning to assess their individual national licensure examinations to determine what differences, if any, exist and whether
such differences are significant. With the enactment of the North American Free Trade Agreement (NAFTA), states are required to eliminate questionable restrictions placed on licensees from Canada as well as Mexico who may wish to practice in the United States and vice versa.

Alternative forms of recognition. One potential change is that government would no longer regulate individuals per se, but rather would regulate the specific tasks performed. This concept has already been explored in Ontario, Canada for a number of the health professions and legislation formalizing this concept was passed in 1991. The Ontario plan is based on the concept that, among the health professions, it is the performance of certain acts (i.e., improper manipulation of joints and muscles) that pose a threat to the public and accordingly it is those acts, rather than individuals, that should be licensed.

Professions want to be recognized as having achieved certain standards or qualifications. There may, however, be other methods to obtaining recognition rather than through licensure.

One idea being considered is the use of Trademarks. Legislation would require a profession to specify the title, letters, or insignias reserved for persons having the specified education, examination results, or work experience. Only those persons meeting the standards would be permitted to use the title, letters, or insignias. The specific criteria for recognition would be established by a national professional association, a national certifying agency, a multi certifying agency, or a state agency. There would be no provision for the evaluation of an individual’s credentials, but rather, the individuals who held themselves out as a member of the profession would bear the responsibility for establishing, if a complaint was received, that they did indeed meet the criteria. Civil or criminal penalties would be included in the legislation for anyone who claimed to possess the education, examination, or experience when they did not.

A similar concept was proposed by the California Board of Medical Quality Assurance (McCready, 1982). Title licensure would permit anyone to perform health care, but people who wished to use a particular title in their practice would have to meet certain standards and would have to be licensed. Care providers would be “required to give prospective patients detailed information about their training, competencies and proposed treatments and to secure informed consent prior to treatment” (p. 75). Proponents of this form of recognition believe that it would introduce greater competition and more freedom of choice into health care. Critics claim that this would only create greater confusion for the public as they would be unable to make a “comparative study of health care alternatives” (p. 75).

A third option would be to concentrate more on the licensure of institutions rather than individuals, particularly in the health care arena. For instance, hospitals, nursing homes, or other facilities would be responsible for the regulation of individuals who have privileges in the facility. It would be the responsibility of the institution to establish standards for being admitted to practice in the institution as well as to remain with the institution. Objective, pre-established criteria would have to be applied uniformly if this option were to work. One negative aspect of institutional licensing is that not all licensees are associated with an institution and
a separate system would still have to be established for these individuals. Another potential problem is that there have been antitrust cases against hospitals for refusing to grant privileges to licensed physicians. Delegating licensing authority to an institution may not necessarily change the darker side of the licensing culture.

Regulation of a single profession by a single board might need to be changed. A number of super boards, each of which regulated a number of similar professions, could be created. This might solve some of the problems associated with the ever increasing number of allied health professions. Rather than a separate board for each group, which is a significant cost to states, comparable professions would be licensed under a single law and be regulated by a single board. A concept initiated in Colorado is the creation of a Mental Health Grievance Board. The four licensed mental health professions (Psychology, Counselors, Social Workers, and Marriage and Family Therapists) each maintain their individual licensing boards, but the Grievance Board is responsible for all complaints and disciplinary actions associated with both licensed and unlicensed psychotherapists. The Grievance Board is composed of members from each of the licensed professions as well as the unlicensed psychotherapists.

As a result of the California Board of Medical Quality Assurance’s 2-year study (1980–1981), the most extreme proposal for solving the plethora of regulation was deregulation of all health care practitioners. Proponents for this option state that the:

existing regulatory system is not effective either at assuring initial or continuing competence of licensees or at protecting the public from incompetent or unethical practitioners. Furthermore, it is argued that licensure creates a governmentally sanctioned monopoly that inevitably increases the cost of health care by limiting access and freedom of choice. In a free market consumers can choose the kinds of care they want and the costs they are willing to pay. Mediocre care would be driven out by competition, and exceptional care would be appropriately rewarded. (McCready, 1982, p. 76)

Deregulation of many professions is certainly an option that should be considered and instituted, but whether it would ever be implemented for the entire health care system is dubious.

Enforcement. Not only must there be revisions to the methods of determining the need for regulation and ensuring initial competence, there must also be revisions to enforcement activities. If government is serious about the licensing of individuals, it must also be serious about its enforcement activities. Additional funding will have to be allocated by the legislature or fees from licensees will have to be increased in order to provide greater assurance to the public that regulation is truly intended for the protection of the public and not the profession.

If additional resources are not made available to state regulatory agencies, complaints by consumers will continue to not be investigated and pursued or will be investigated in an inefficient manner. Regardless of the state or profession, there is currently a large number of practitioners who should have been disciplined, but who continue to practice simply because there are too many cases for the agency to handle efficiently. Decisions have had to be made as to which complaints should
be investigated immediately and which should be postponed or even ignored. If states are unable to take the appropriate disciplinary action, other organizations will have to assume the responsibility.

Institutions themselves will have to do a better job of policing their employees or practitioners. Insurance companies will need to enhance their role and more closely review the reasonableness of claims filed, the quality of services provided, as well as the frequency of complaints against certain individuals. Professional associations will need to become more aware of the quality of service provided by their members as well as the behaviors exhibited (i.e., impaired practitioners).

If the enforcement role of nongovernmental entities is expanded, it will necessitate better communication between the private sector and the regulatory agency. Currently, someone can be dismissed from a hospital or office for incompetence and the licensing agency is never informed. The licensee merely moves to another state, establishes practice, and continues to practice in an unprofessional or incompetent manner. Unless the regulatory agency is informed of this situation, nothing can be done to stop the individual. It is critical that organizations eliminate the notion that they must “keep their dirty linen hidden” if appropriate enforcement is to occur. Mandatory reporting laws may need to be enacted to reduce or eliminate protection of colleagues in the professions.

Another group that will need to assist government is the consumer. They need to become better educated about what they should expect from providers as well as the appropriate procedures for filing complaints. Consumers need to be less willing to accept poor quality and more willing to voice their concerns. In order to do this effectively, they need to receive clear, understandable, yet detailed information about practitioners’ responsibilities and their rights. This information should be distributed by both the public and private sectors as well as by individual practitioners. States need to develop and institute creative, yet informative, procedures and methods to help consumers become more aware, informed, and active in the regulatory process.

Even if discipline is maintained by government, alternatives to formal administrative hearings will need to be instituted. Mediation and informal compliance conferences will need to become more prevalent. Another optional enforcement technique might be the issuance of tickets, similar to parking tickets. If violations are observed during an inspection, a ticket is issued and a fine assessed. Rather than requiring a formal hearing, the practitioner merely pays the fine. If the same or similar violations are repeated, it might then be necessary for an investigation and hearing.

By achieving a closer working relationship among regulatory agencies, the private sector, and consumers, the enforcement process will be enhanced. The incompetent or unethical practitioner will no longer be able to escape unnoticed.

Conclusion. Reaching consensus on how to best serve the public will be a major task facing states. The increased interest by the federal government in occupational and professional regulation will add to the states’ financial and staffing problems. Given the pressures being placed upon states, it appears that they have two viable options:
develop a closer, more unified working relationship with each other or relinquish regulatory control to the federal government or the professions themselves. While consumers are requesting stronger regulatory control, others, including some of the professions, are suggesting that standards be relaxed or are discussing the concept of self-regulation. (Brinegar & Schmitt, 1992, p. 571)

Should self-regulation be granted, licensure would return to the way it was in the 17th and 18th centuries.

Whether the changes mentioned will actually occur is difficult to predict. One thing, however, is certain, and that is that change must and will occur. Legislators, regulators, members of professional organizations, those who are regulated as well as those seeking regulation, and consumers need to recognize and accept the impending change. As we approach the 21st century, everyone who has an interest in regulation must begin to recognize the positions of others. With a change in attitude, perhaps the various groups will no longer “rail on in utter ignorance of what each other mean, and prate about an Elephant not one of them has seen.” B.F. Skinner, a noted psychologist, once said that if people don’t change, they become prisoners of their own experience. Reliance on “we’ve always done it that way” will not enable improvements to be made in the future. Regulatory legislation may have flourished in the 1970s and 1980s, but will the trend continue into the 21st century? Will new and improved methods of regulation emerge? Will the critics be heard and changes made? Only time will tell.

REFERENCES


