

Grey Areas

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION



A Futurist Looks at Professional Regulation

by Richard Steinecke
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Earlier this month Steven Lewis, a popular health policy consultant, made a presentation at an international conference of regulators on the future of professional regulation.

Lewis identified a number of challenges to the traditional model of credentialing and regulating individual practitioners. For example, in the health care sector, nurses are successfully performing services previously only done by highly trained physicians such as anaesthesia, endoscopy and primary care. Offshore interpretations of radiographs are often of a high quality. Skilled technicians with a few months' training are doing high quality cataract surgery in places such as India and Africa. Personal support workers are multi-tasking in community care with good results. The concept of requiring highly trained certified professionals as the exclusive providers of highly skilled services needs to be re-examined.

At the same time there are challenges to the traditional approaches of educating professionals. There are examples of self-taught people successfully passing entry-to-practice examinations in traditional occupations such as law. On-line courses compete with traditional forms of classroom learning. In the teaching profession vastly different certification requirements internationally produce similar student outcomes.

The reality is that “a lot of bad stuff happens” in spite of regulation. Increased educational requirements are not producing breakthroughs in quality. In many professions the structure in which the service is provided (e.g., how the provision of services is organized, workplace culture, policies and procedures) and team dynamics have at least as much of an influence on performance as does individual competence. Regulators focusing on individual performance may become largely irrelevant.

Also, in the borderless world, mobility makes traditional local-jurisdiction regulatory requirements and standards impractical. Economic unions and labour mobility agreements require a broader perspective for regulation. For example, these pressures are resulting in a decoupling of competencies from credentials when registering or licensing professionals.

Added to these developments is a decline in public trust in public institutions including professional regulators. Examples are frequently in the headlines including the investment banking debacle and economic collapse of 2008, various accounting scandals and repeated health care failures in accredited institutions by certified practitioners (e.g., radiology misinterpretations). Ironically, however, the response to these events is usually to call for increased regulation with greater accountability and stronger sanctions.

So, Lewis asks, is the solution more, less or different regulation? He posits five trends in professional regulation that seem to be inevitable:

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This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897 Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

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1. Entry-to-practice credentials will matter less and demonstrated career-long competency will matter more. In fact, the tide of increasing credentials should probably be turned back as it is proving unhelpful to quality and a barrier to accessing reasonably priced services. View competence as an ongoing process rather than an event.
2. The emphasis on core standards for practitioners and even quality assurance will have to give way to continuous quality improvement. Greater trust will be put in real-time performance data (e.g. outcome statistics) than formal stamps of approval.
3. Regulators will be expected to anticipate more and react less. While Lewis did not get into specifics, perhaps this means that regulators will need to anticipate trends by evaluating the information that is already in their files or that is readily available to them. Or perhaps it will mean that regulators will have to engage in a more deliberate and intense risk-management analysis of their activities and the practice trends within the profession they regulate.
4. Siloed and distinct regulation of individual professions must transition into integrated and fluid regulatory activities. If practitioners work in teams, why cannot regulators do so?
5. The culture of professional autonomy will almost certainly be replaced with a culture of collaborative and joint accountability.

Obviously this will mean that regulators will have to learn new ways of regulating professional activity. In one of his illustrations, Lewis indicated that while it is much more difficult to assess the quality of work of a team and to design methods of enhancing its performance, the benefits of such quality improvement activities would probably far outweigh individual quality assurance of the team's individual members.

Lewis concluded with a challenge to regulators to "own the future". Openness, transparency and candour are keys to maintaining public trust. Put one's assumptions (e.g., that more education means higher quality services) to the test of research and evaluation. Regulators should design alternatives to the exclusive self-regulation model before others design them independent of regulators. Finally, regulators need to adapt structures and processes to a world of rapid knowledge turnover and team-based practice.