



**Regulation Matters:  
a CLEAR conversation**

## **Episode 42: Research and Trends Related to Criminal History and Professional Licensure**

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**Line Dempsey:** Welcome back to our podcast, Regulation Matters: a CLEAR conversation. I'm your host, Line Dempsey. I'm currently the Chief Compliance Officer with Riccobene Associates Family Dentistry here in North Carolina, and I'm also the chair of CLEAR's National Certified Investigator Training committee.

As many of you are aware, the Council on Licensure, Enforcement and Regulation, or CLEAR, is an association of individuals, agencies, and organizations that comprise the international community of professional and occupational regulation. This podcast is a chance for you to hear about important topics in our regulatory community.

Our guests today are Carla Caro and Rebecca Durcan. Carla is a Program Director at ACT's Credentialing and Career Services Group based in the New York City area. Rebecca is a partner at Steinecke Maciura LeBlanc in Toronto, Ontario. We're glad to have you both with us today. Welcome.

**Rebecca Durcan:** Thank you.

**Carla Caro:** Thanks for having us.

**Line:** Absolutely. Well, we're glad to speak to you guys. And let me also thank our listeners for joining us today. Today we are following up on a session from our 2020 CLEAR Annual Educational Conference that explored how licensure and regulatory bodies consider and deal with issues related to criminal history or record among applicants for entry to practice and currently licensed or registered individuals. First, Carla, let me start with you. And she's going to share some of the results from the international survey of organizations. And then Rebecca will then discuss how Canadian regulatory bodies are dealing with issues related to criminal history or record.

So to start off, Carla, can you tell us a little bit about the impetus for the research and the session?

**Carla:** Sure. Thank you. This session arose because a number of US jurisdictions have had legislation proposed or enacted that prevent or prohibit licensure boards from barring individuals based on their criminal history, background, or record. We wanted to think about how criminal records are considered by licensure or regulatory bodies in light of these trends.

For context, there are several rationales underlying these types of legislative initiatives. One is to reduce barriers to employment for individuals with a criminal record who have completed their sentences. Often such barriers have been put in place, regardless of the severity of the infraction, its relationship to the profession or the role being regulated, or the length of time since it occurred. From a regulatory perspective, however, such reforms do not always adequately consider the public protection function of professional regulation and licensure bodies.

We conducted the survey research to get a snapshot of where regulatory bodies currently are regarding their consideration of criminal background in licensure and regulation decisions. We partnered with Rebecca to get a more international perspective and see how other countries are approaching these topics, as well.

**Line:** Is there anything in maybe the recent political and social landscape that makes these issues even more central today?

**Carla:** Certainly. Putting this topic into the broader societal picture, in the US in particular, criminal justice reform has become a front burner issue. The George Floyd murder has focused the spotlight on racial bias in policing, the courts, and the legal system. Demonstrations in support of systemic reform were in the headlines during much of last summer, in the US and around the world.

Speaking specifically again about the US, there's a growing recognition that Black Americans and other people of color have historically been discriminated against by the legal system. As a result, the broad use of criminal records as a barrier to licensure may lead to a disparate impact on these groups, ultimately resulting in a lack of equity and opportunity and diversity in the workforce.

And certainly, equity, diversity, and inclusion are also at the forefront of many conversations today. So, this trend towards second chance or fair start legislation is more timely than ever.

**Line:** It certainly makes sense. So, with this international survey, how was it administered, and what kind of response that you get?

**Carla:** Sure. The survey was administered in the summer of 2020, and invitations were sent to a targeted CLEAR mailing list. We looked at those who had, in their titles, legal oversight roles, relations to fitness to practice, investigative roles, or C suite roles. And we got 232 responses, which is a very nice number for a survey of this type.

Of those responses, 45% were from the United States, representing 35 states, and 44% were from Canada, including eight provinces and territories. The rest of the responses were from 10 European countries, Australia, and New Zealand.

The majority of the respondents were from regulatory bodies in healthcare related fields, including medicine, nursing, allied health, EMTs, OT, and PT. We also had respondents from pharmacy, social work, psychology, real estate, architecture, and many more. So, clearly, many occupations had a keen focus on protecting the public and ensuring the safety of those served. And that is a lens through which we want to look at their responses as well.

**Line:** So, ultimately, what were the key findings?

**Carla:** Almost all boards considered applicants' criminal history. And three-quarters of those respondents had no time limits respecting the length of time which they looked back at criminal histories. Some looked back at the entire lifetime, back to the age of 18. If they did have a time limit for reviewing criminal history, it could range from look-back periods of five or fewer years to up to 10 years, or the time was discretionary based on the offense. In contrast to this, some of the proposed legislation we've been seeing limits a review of criminal background to the most recent three or fewer years.

Of the respondents, about three-quarters of them from the United States said any criminal history was subject to review, but one-quarter said that the criminal history subject to review needed to relate directly to the job, the role, or the profession to be considered. In other jurisdictions, however, the percentage saying any criminal history was subject to review was higher--it was 89% in Canada to 100% for the other jurisdictions. So, the review was more targeted in US jurisdictions based on what the licensure board was looking at.

The regulatory boards relied on a range of methods for obtaining criminal history. Most commonly, they asked for self-report, or self-disclosure, or formal criminal background checks. They were less likely to use their own investigative processes or other methods, mainly due to cost considerations.

And, in general, the focus of the criminal reviews tended to be more on serious crimes, such as felonies and misdemeanors. But a significant number of respondents also looked at things like no contest pleas, whether people were on probation or parole, any arrest records regardless of whether it led to an indictment or a conviction, specified information, expunged records. And so groups were using, in some cases, a fairly broad brush as to what they were looking at.

So, generally speaking, I think there was a great deal of variation in how regulatory boards used criminal background in their decisions, whether it's what was considered, for how long, whether or not it related to the occupation or profession, as well as the processes for review, whether it was subject to mandatory or permanent ban, and a number of other issues.

**Line:** From the Dental Board and being a Senior Investigator for them for so long, I'm sure they looked at things like alcohol related things that were done maybe when they were not of legal age and also looking at if it was a repeat issue--something that happened one time because things got out of hand versus this is a habitual issue. So, that's interesting. In the US, what kind of trends were you seeing as far as looking at the criminal background record in regard to licensure and employment decisions?

**Carla:** Sure! US respondents were certainly more likely to say that they have seen legislation proposed or enacted in their states to limit the consideration of criminal background. More than half of the respondents to this survey said that there has been proposed or enacted legislation.

This was much lower in Canada. Less than 10% of the respondents from Canada said there's any talk at the legislative level about imposing bans on licensure boards, and none in Europe or Australia or New Zealand. So, this trend for legislation related to consideration of criminal background is certainly more prevalent in the United States.

And in the US, sometimes these licensure legislations are also tied to employment law. On the federal level in the US, there's a law being put into place that may, in fact, disqualify individuals with certain types of convictions from state licensed jobs, specifically in health care and education. So anything related to child endangerment, a lot of things related to drug trafficking--these are automatic bars that are permitted by federal law.

But typically, as in the case in the US, employment law and any restrictions on licensure vary greatly by state. Some states are much more hands-off regarding licensure board decisions, and others are proposing or enacting legislation with a very broad brush without taking into consideration variations in the types of professions being regulated.

In some cases, states are mandating mechanisms or mandating that the boards put mechanisms in place for how individuals can obtain relief. They're permitting certificates of rehabilitation. They're putting limits on what may be considered and imposing these time limits that we've already talked about. In other cases, they're putting into place laws that say that boards can only look at criminal infractions that substantially or directly relate to the profession or role being regulated.

And finally, we have this whole issue of good moral character or moral turpitude or anything that is sort of vague or less defined legally. Some states are taking a closer look at that, to make sure that boards are not using this in a way that might be allowing them to make decisions that are more based on a gut feeling than on a fact pattern.

**Line:** Right. Yeah, absolutely. Well, you know, obviously, regulatory organizations and boards, their mission is to protect the public. But how are they balancing that with the other side of that, of providing opportunities for employment to ensure that they are not necessarily barring someone otherwise that would be qualified from practicing in the profession?

**Carla:** Yes, I think a lot of boards, primarily because of this focus on public protection, are for the first time having some conversations about whether they're having these unnecessary barriers and what the individual opportunities for employment are.

Again, it's much more likely that organizations are having conversations with their boards or internally with their staffs in the United States than in the other jurisdictions we surveyed. So, they're talking about considerations relating to the level of risk to the public and the public protection mandate and the potential for harm. And they're having these conversations with other licensure and regulatory boards. They're talking to their legal counsel and trying to drill down on what infractions may in fact be relevant to the profession, what kind of criminal activities would be an automatic bar, permanent in some cases. You know, things like financial crimes might automatically and permanently bar someone from acting as an accountant. So, they're having more nuanced conversations about what should be considered and what, perhaps is not necessarily going to impact public safety or that part of their mission. And they're also talking about things like what is an acceptable level of rehabilitation. What is evidence of rehabilitation and what are these mitigating factors such as the time elapse, one time or habitual, and these things that you talked about earlier.

**Line:** All difficult questions to answer easily. Looking forward, what opportunities and challenges for regulators do we have for them to look at?

**Carla:** Yeah, I think this is a great opportunity for boards to get in front of this issue, rather than reacting to mandates from above. It's always better to put policies in place based on a reasoned consideration, rather than suddenly having a law come down and having to scramble. So, we would say that it's a great opportunity to engage your board and your legal counsel and your staff in a proactive and systematic review of policies and procedures so that you can develop approaches that balance your principles, your mission, your public protection mandate with things that are proportionate to the level of risk and the nature of offense. We would suggest taking the opportunity to thoughtfully question existing policies and procedures and not just be reliant on past practices and to create decision processes that are less subject to implicit or unrecognized bias within the organization or impacts that may have resulted from systemic bias in the criminal justice system.

Ultimately, the goal is to ensure a fair and unbiased review for all of your applicants for licensure and also to have objective and consistent decision making and to systematize your processes. Make sure you have clear rationale so that you can survive potentially a court challenge, good definitions of things like what is an extenuating circumstance, rehabilitation, etc. Some organizations have developed matrices that help them to evaluate things at a more systemic basis, which can also help reduce the load when you're looking at things case by case if you have a very large number of applicants. If you have a systematic process, you can help move forward both fairly and quickly.

Some of the challenges that the boards will have is certainly those regulating professions that are dealing with vulnerable populations. They may need more stringent requirements. So, state laws that

apply equally to all boards, regardless of the population, may have to have different requirements in place. And we certainly know in the United States that legislative changes that are enacted on a jurisdictional basis can lead to inconsistencies and have impact on mobility. You may be licensed in one state and move to another state and suddenly find that you might be barred from getting a license there.

There's also the issue of cases where you have a private certification--it's a prerequisite to licensure--and the organizational policies and ethics and procedures within these private certification organizations may be at odds with what a state law regarding licensure is. And these are really real situations that have come up.

But in general, the environment and, I think, the zeitgeist today is tending towards really thoughtful consideration of these topics related to criminal background, and the opportunity is there for regulatory and licensure boards to develop these processes in a proactive manner.

**Line:** That was wonderful for you sharing the survey results, and as well as some of the trends that we're seeing. So, let's turn to Rebecca now for a Canadian perspective. So how do criminal backgrounds impact applications for licensure and registration in Canada? Is it different?

**Rebecca:** Yes and no. And I'm going to pause and just say that Carla's overview of her study and her extrapolations in many ways can apply to what's happening in Canada. And the recommendations that she suggests: the need for objectivity, the need for impartiality, the need for consistency--always important for every requirement, but you can see that when it comes to criminal background checks or criminal background history, it's all the more important.

And in Canada what seems to be happening is, pretty consistently, regulators require evidence of any criminal background, providing a criminal background check, which is acquired by the local police force--you go and you apply. Regulators are requesting that piece of information as to whether or not you have had any criminal history as evidence of good character. And there has been this conflation between whether or not you have a criminal background as determining whether or not you have the requisite character to enter into a profession. So, I would say quite consistently across Canada, across all the provinces and the territories, that is a piece of the puzzle that is required. That is a piece of the puzzle that has to be provided in order to demonstrate that one requirement. So yes, you have to provide a criminal background check. But very rarely is there a box in the application form saying, 'Do you have a criminal background history?' It's more, 'Do you have the requisite character to enter into the profession?' And here is one piece of evidence to demonstrate.

And without going too far afield, what I am seeing is sort of sometimes mixed messaging here in Canada. There is one trend where people are saying, 'Timeout. Is this really, in today's day and age, the best evidence of good character?' You know, are we placing too much weight on whether or not someone, at some point, had a criminal conviction or sometimes even a criminal charge--some criminal background checks will actually bring up charges, not just convictions or findings of guilt. So

you have a certain trend saying, is this really the best way to address the intent of the requirement, being good character.

And just as of last week, there was a big article in The Globe and Mail, which is one of the national papers up here in Canada, saying that within the medical profession, there's been too much focus on clinical competencies, and we need to focus more on the personal competencies. And it was interesting that there wasn't really a focus necessarily on criminal background; it was on social skills. It was on what we kept seeing emerging out of #MeToo and harassment and bullying, saying that those skills are really, really important. And when I read this, I'm like, 'Totally valid. That's not going to be captured in a criminal background check.'

And then you have the other trend of recognizing that, saying, 'OK, we are placing too much weight on a criminal background check.' So the Law Society here in Ontario, which regulates I believe 50,000 lawyers and 10,000 paralegals - what it has decided to do is saying, 'OK, timeout, they're going to be some criminal convictions we want to know about, depending on the severity, depending on the significance to the profession. There are some we don't actually care about. So for example, if there was a pardon provided, we don't need to hear about it. If it was a conviction relating to cannabis under a certain quantum (because, and in Canada now that has been no longer criminalized). So, the Law Society has said, 'OK, you might have been convicted of that 5, 10, 15 years ago; that's not speaking to your character in order to enter this profession.'

So you can see there's a bit of a revolution saying, yes, most regulators still require this piece of information, but I'm seeing more of a sophisticated nuance (to pick up on Carla's word) as to why do we need this information? What weight should be placed on this information? And do we actually even need this information at all?

**Line:** That's very good. So, do the Canadian regulators view a criminal background as a barrier to meet good character requirement?

**Rebecca:** So I wouldn't say there is the hard and fast barrier that we see down in the States, that sort of legislated wall. That being said, I'm going to be frank. When you look at the cases, when you look at the case law, when you look at challenges, it is quite clear that certain criminal convictions, sometimes even criminal charges, do, in fact, pose a barrier.

And to get back to Carla's point, I find it's going to depend on the profession, it's going to depend on the charge or conviction, and it's going to depend on the duration of time that perhaps has passed. There was a case a couple of years ago where a medical school graduate applied to obtain his, essentially, preliminary license (we call them certificates of registration, but his preliminary license here in Ontario), and he was denied. And the regulator said the charge in and of itself, sexual assault, was, in and of itself, a barrier. So, there was no finding; it was simply the charge, and that was enough. And it was challenged, and the challenge was upheld, saying, no, no, there's too much of a significance to this actual charge and the conduct that gave rise to the charge. The public would not

have the requisite confidence in the regulator or writ large the profession if we allowed you in. Now, the trial proceeded; the gentleman was acquitted. He was not found guilty. He re-applied, and the regulator said, 'Sorry. Yes, you were not found guilty, but you were not proven guilty beyond a reasonable doubt,' which is a very high threshold to meet. 'We are still not confident.' And the gentleman did challenge, and the gentleman was successful on that challenge.

And the appellate board saying, 'No, no, no, no. In this case, you were justified on the charge front, but this gentleman has been acquitted of this crime. You cannot hang your hat on that to deny him entrance.' There are a host of other examples, but that to me was a really interesting situation where a regulator, with their best-interests-of-the public hat on, was told, 'No, you're being a little too vigorous here. You can't rely on that in order to deny someone entry into a profession.'

So, I would say, as people love it when lawyers say, it depends on the facts. It depends on the context. I will say that you will see it in the legal profession, there have been people charged with or convicted of prostitution, convicted of serious criminal assault, convicted of murder who have been permitted into the profession. There was a determination, and the good character process, especially in the legal professions up here in Ontario, is quite robust. It's a full hearing that will focus on that whether or not you have the requisite character.

So there have been situations within the legal professions where they have permitted it. They have said that these findings have occurred, but because of either the remediation that has occurred between then and now, because of the certain individual mitigating factors, that those applicants have met the good character, even with those prior convictions. So you can really see that it will depend on the individual facts. But I think that the Law Society's approach of just carving out certain information that has been determined not to be relevant -- yes, it was a criminal conviction, but when you get down to the actual intent of the requirement, do you have the requisite character to be a member of this profession?

They're really drilling down and saying that we don't need this one size fits all, criminal conviction--yes or no. We can say that we know how this profession works. We know what the public expects. And not all prior criminal convictions are remotely relevant to assessing an applicant's character.

**Line:** That's very interesting. So, as attitudes change towards criminal background and using that, have you seen any regulators pivot in response to that?

**Rebecca:** Yeah, I think the Law Society is perhaps the best one that I've just talked about. And I think it's interesting what's happening, if I take a step back perhaps from the criminal background, but even on the good character requirement, I am seeing a lot more chatter on the regulatory front as to, what is the merit? What is the point of actually having this requirement upfront?



We impose, obviously, a lot of educational and clinical requirements--quite appropriately--and those are objective markers. And what I'm seeing within a lot of the regulatory world is discussion on, is the intent of this requirement actually proving its worth?

There was a study, and I mentioned this during the CLEAR Conference and I failed to follow up and provide the data, so I'm going to do that to Stephanie after. But basically, there was a [study out of the University of Connecticut Law School back in 2014](#) looking at this good character requirement. This study comes up a lot when I hear regulators talk about good character. And what the study was doing is saying, let's look at that good character requirement and how much of that requirement predicts whether or not that applicant becomes a law-abiding, regulatory-respecting member of the profession.

And what the study indicated is that, when you get down to it, it's not a great indicator. If the intent of this requirement is to say that we only want people who are going to follow the rules, we only want people who are going to be safe members of profession so the public isn't placed at risk. And, if you have a past history of a criminal involvement, which would be an indicator that you don't have a good character, and compare that to someone who has no past criminal history, you would think (if the intent of this requirement is to weed out the bad character and only let in the good character) that past history of criminal conviction must be really relevant. And the study indicated that it's not a great indicator--that people with past criminal history were no more statistically inclined to get into trouble with their regulator than those who had a "clean" or non-criminal history.

So, you see this study, and you see a lot more chatter saying, OK, criminal history is part of this good character requirement. Do we need this requirement? Is this requirement fulfilling its intent, or are we putting an unnecessary barrier in place which unduly and disproportionately impacts those with criminal background? And again, not to harp on the Law Society of Ontario, but they have really introduced this concept and mindfulness that, at the entry to practice level, there may be a certain segment of the public that is disproportionately represented in criminal proceedings.

And there, there was a case up here in Canada called the Glaude or the Ipeelee decision (there were two separate decisions), which resulted in criminal courts taking into account certain citizens of Indigenous background. If they did have a history of criminal background, a contextual approach was required to be applied. So saying, OK, if this accused before you has had a criminal background, let's look at the contextual factors of that person's life that led them down that path.

And the Law Society said, let's take that sort of approach at the front end. And there are going to be certain people who are completely underrepresented in the legal profession in Ontario, and across the country, and why is that? Why aren't we getting enough applicants from those of the Black community, or the Indigenous communities, or less-white communities? Why is that? And so there's an outreach, and there's a recognition. So, it's not that they're lessening the requirements, not at all. It's just taking a contextual approach. So, you know, I've kind of gone astray. But you're seeing

regulators really take a step back, and asking themselves: is the requirement, and is the intent of the requirement, actually doing what it's supposed to do? Are we being too rigid on our requirements? Are we being too rigid on the information that we request? Are we really taking a step back and asking, are these requirements doing the job, and if not, how can we tweak them or perhaps eliminate them? So, I am seeing regulators talk a lot more about this. Again, I think the law societies across Canada have really been a bit of a leader on this front.

I can see though, back to context again, in Ontario, there is no prohibition against a lawyer dating their client. Contrast that to the teaching profession, contrast that to the medical and nursing and health professions, where there is an absolute red line. So that nuance-- certain crimes, certain history, certain conduct, may be deemed to be fine within the legal realm, which would not be considered to be suitable within other professions where, arguably, you may have a more vulnerable populace. Now, I'm going to say there could be a lot of vulnerable clients, obviously, within the legal communities. But, back to that nuance and how the profession and the demands of the profession and the vulnerable populace that that profession would be serving, I think, will, quite understandably, influence the level of risk a regulator is prepared to take on that good character temperature.

**Line:** That's really interesting. And I'm reminded of back when I was working with the Dental Board, and I think they had a good approach to things. But you know, how often are you dealing with people that have had one or two small incidences that they've had in their past, and other people maybe didn't have a charge, but they just didn't get caught may be the reality of it. So, for Canadian regulators, are they interpreting criminal backgrounds consistently?

**Rebecca:** I am going to say probably not. I'm going to say that there are interesting cases that are coming up where you have sort of similar facts and sort of similar situations, where you would have a criminal conviction in the past, a significant amount of time had passed, and one regulator is going to be like, 'OK, this fact pattern is fine,' and another regulator would have a similar fact pattern and say, 'no, there's no way.' And it's not necessarily always huge industry differences. I'm seeing sometimes for whatever reason, and I don't know if this is (and I'm so glad Carla mentioned it) the bias influence. I think that what I am seeing is a huge recognition in Canadian regulators of the impact and existence of unconscious bias, and a lot of training is happening, really exciting recognition and understanding.

And again, professions and regulators are made up of people, and people have experiences. And a lot of regulators are populated by people who tend to have time to give back, who tend to maybe be a little older, who tend to be in a financial situation to be able to give back, which may not necessarily reflect the profession itself. And I'm not trying to target older people, because I'm one of them now. I'm just saying that when you really consider the people making the decisions, depending who's around that table, if there are unconscious biases that have not been recognized and parked, that they can have an undue influence. So that is why I'm not necessarily surprised that you are gonna have inconsistencies, because it's not an objective marker at registration or licensing committees that they can apply or impose. You're going to have that nuance. You're gonna have that difference of

approach in different committees and different regulators, over different jurisdictions, over different professions.

So the short answer is yes; I am seeing somewhat inconsistencies. But I still think that we are at the early stage of the recognition of the unconscious bias factor. And I'm hoping over time with more training, with more recognition, you're gonna see an evening out, you're gonna see more of a parity of decisions. Obviously, they're going to be different results; but, hopefully, those are going to be attributable to different individual factors as opposed to that gut feeling, that concern that we can't let this person in because \_\_\_\_\_. Really being able to articulate the risks to the public should the regulator allow that applicant to become a fully-fledged licensee.

**Line:** Well, that's excellent. I think this has been a great conversation, so we definitely thank you, Carla and Rebecca, for speaking with us today.

**Rebecca:** Thank you. And all credit goes to Carla and all her hard work.

**Carla:** It's been a great, great collaboration working with you, Rebecca.

**Line:** That's awesome. Well, hopefully, we can get our border back open here soon. I've got a lot of CLEAR family, if you would, that I haven't been able to see in quite some time and be able to give some folks some hugs up there, so give them up there for us please.

**Rebecca:** Definitely.

**Line:** And I do want to thank our listeners for tuning in for this episode. We invite you to continue this conversation through our CLEAR discussion forum. This podcast episode will be posted in the CLEAR Communities, and members can reply to the post with comments. Here's some additional conversation questions to kind of start: Does your regulatory organization have a good moral character requirement for licensure? What policies in your jurisdiction or organization allow or prohibit you from considering criminal records when you are reviewing licensure applications? Is your policy different depending on what profession you regulate? We'd love to continue this conversation on CLEAR Communities, so please utilize that forum.

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Feel free also to visit our website at [www.clearhq.org](http://www.clearhq.org) for additional resources, as well as a calendar of upcoming online programs and events. Finally, I'd like to thank our CLEAR staff, specifically Stephanie

Thompson. She is our content coordinator and editor for our program. Once again, I'm Line Dempsey, and I hope to be speaking to you again very soon.

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