



**Regulation Matters:
a CLEAR conversation**

Episode #46: Questions a Legislator Should Ask – A Foundation for Regulatory Understanding

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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 President-elect for CLEAR. Our regular listeners know about CLEAR. You can fast forward about 30 seconds if you like. But this podcast episode is also geared towards state legislators and legislative staff, so we want to give you some background on CLEAR.

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. The organization provides educational sessions, networking opportunities, publications, and research services for those involved with or affected by professional and occupational regulation.

As a neutral forum to exchange and provide for the sharing of best practices, CLEAR serves and supports the international regulatory community and its vital contribution to public protection. CLEAR has defined its own educator role as proactively identifying critical issues, providing a dynamic and interactive forum for the exploration of these issues, and collecting and disseminating relevant information on that. This podcast is a chance for you to hear about important topics in our regulatory community.

Today's podcast episode is the first part of a series of conversations about *Questions a Legislator Should Ask: A Foundation For Regulatory Understanding*. The series is designed to provide important questions to be asked, as well as background information, to assist policymakers in their deliberation on proposed new professional regulation as well as revisions to current statutes.

This series of online conversations, as well as the book on which it is based, can also be of value to legislative staff and regulators who may need to provide information to stakeholders about the benefits and liabilities of regulation.

With us today, we have Kara Schmitt, author of *Questions a Legislator Should Ask*; Sara Chambers with

the Alaska Division of Corporations, Businesses and Professional Licensing; Micah Matthews with the Washington Medical Commission; Ronne Hines with the Colorado Department of Regulatory Agencies, Divisions of Professions and Occupations; and Alice Henley with the Alabama Board of Nursing. Welcome to you all.

Speakers: Good morning! Thanks, Line!

Line: Great. And we're glad to speak with you. And also, let me take a moment to thank our listeners for joining us, as well as any new legislator staff or regulators that may have joined us for the first time. We really welcome you to this podcast.

So, in this episode, I think we want to lay the groundwork. So let's start with the question, where does the authority to regulate professions come from? So, Kara, let's start with you. Why don't you start us off?

Kara Schmitt: I think, in general, most people believe that the 10th Amendment, ratified in 1791, is the basis for states to regulate licensure. This amendment states that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people." In actuality, the Constitution itself grants states various powers, including police powers of health, education, and welfare.

The 10th Amendment merely clarifies the states' ability to perform certain tasks in order to resolve any issue that states might have had regarding their potential loss of power at the time the Constitution was implemented.

Interfering with states' powers was never intended in the Constitution. Instead, if the power was not specified in the Constitution, Congress could not exercise it. If given, Congress might exercise it, although such power should never interfere with the laws of the Constitution of the States.

When it comes to licensing, which is considered one of the states' police powers, the overall intent of restricting a person's professional practice is that it is necessary to protect the public's health, safety, and welfare.

Whenever regulation is being proposed, or current legislation is being reviewed, legislators must remember that, even though they have police powers, the overriding purpose for regulation must be public protection.

Line: That makes great sense, and I appreciate you bringing that in and helping us with that. So, we have always heard different terms when we're talking about professional and occupational regulation, in addition to the actual jargon that may be attached to that particular profession. Can we now talk about the purposes of statutes, rules, and regulations, as well as policy and guidelines, and talk about the different terminology on how these different things fit together with one another? So, maybe

Sara, we'll start with you on that. Could you address that?

Sara Chambers: Sure, thanks, Line. So, we hear the terms "professional," and "occupational," and those are fairly interchangeable, as are, sometimes, terms like "permit," "license," "registration." Depending on the jurisdiction, those can be pretty interchangeable or can have really different meanings, so it's important to know what the law in your area says about what these terms mean. Now, most important is to know what authority or weight they carry. So, first, the foundational authority to regulate professions typically comes from the government, often the state or territorial legislature in the form of laws, which are also sometimes called statutes. These laws give authority to groups to perform that day-to-day regulation, and those groups that receive that authority are usually boards, sometimes called colleges in an international context, or a state agency. So, boards and agencies have the ability to adopt binding regulations, which are often called rules. And those have the force of law. Those go through a rigorous public process that receives the scrutiny of the people who they affect. And so those have the ability to be reinforced, like laws.

Guidelines or policies may be adopted by those governing boards or agencies to sort of illustrate or clarify practices. However, they haven't gone through that rigorous public process like regulations or rules have, so they don't have that same binding effect. So, it's important again to know what the law says about those terms in your area and to make sure that you're using the right term for the right job.

Line: Well, that's perfect. Micah, would you like to add to that?

Micah Matthews: Sure, Line. I find it's helpful to think of these terms like a hierarchy of an upside-down pyramid where each smaller level helps interpret the one above. The statute's the broadest, and rules or regulations help clarify the statute. Interpretive statements, policies, guidelines—those help clarify the rules, at least in my jurisdiction. We often see legislators and other policymakers wanting to take action on a regulatory issue, but those issues tend to be pretty granular and complex. So, with a statute, they set the regulators on the path to address the issue through rulemaking and stakeholder work that would otherwise just not be possible during the fast pace of a legislative session.

Line: Thanks, Micah. So, the questions in *Questions a Legislator Should Ask* are intended to help guide legislators towards achieving the desired goal of creating legislation that protects the public's health, safety, and welfare. So, let's share some of those questions and talk about why each one is important.

The first question is: Is there a problem? Alice, let's turn to you on this one.

Alice Henley: Thanks so much, Line. You know, when occupational licensure reform came to the forefront several years ago, one of the more frequently cited examples was the occupation of hair braiding. And hair braiders in many states were required to obtain a cosmetology or other occupational license in order to braid hair. Over the last several years, many state legislatures have either eliminated the licensure requirements for hair braiders or they've created a simplified registration or license that requires significantly less time and expense to obtain. Legislators who

addressed those issues surely asked, is there a problem?

Proponents for deregulation of hair braiding would say yes; the problem was that the level of education, training, and experience required to obtain a license is both unnecessary for safe and effective hair braiding, and it also has the effect of serving as a barrier for entry into the occupation.

So in some situations, such as hair braiding, constituents might be advocating to deregulate an occupation or profession. But there are other situations where your constituents may be advocating to create a license for an occupation or profession.

For example, consider the field of music therapy. Currently, there is a voluntary certification for music therapy, but in the last several years, states have begun to institute licensure, registration, or certification requirements for music therapists. In fact, the Certification Board for Music Therapists, which certifies musical therapists, and the American Music Therapy Association have worked together on a State Recognition Operational Plan to inform state groups regarding professional recognition in states.

So, as a legislator, you might first want to know, is there a problem?

Of course, proponents for the regulation of music therapy might argue that recognition of that occupation would ensure the competence of the music therapists and might also increase the likelihood of reimbursement for music therapy services by third-party payers.

So I think it's important to remember that in nearly every circumstance, there will be at least two sides to the argument, and legislators should make sure that they seek out information from all the interested parties before they determine whether there is a problem that would be best addressed in an occupational licensure context.

Line: Well, those are certainly some great examples, and they do actually help illustrate the point. So, the next question in the series, then, is: Is there a problem that requires regulation? So, let's go back to Micah on that if you would.

Micah: That is always a question I encourage legislators that I work with to ask. I am fortunate in that many have backgrounds in health care, which is the area that I'm involved in. This leads to a more focused conversation and questions about if the problem is actually a problem, a disagreement or a desire of a particular profession.

So, some recent examples from Washington involve the Sunrise Review Process, which we'll get into a little bit later, where a legislator asks us to review a proposal for a new profession or a scope expansion of an existing profession.

In the most recent cases, it involved the creation of a new profession in Washington, the

anesthesiologist assistant. In that instance, the proposal was needed because this profession could exercise all the levels of anesthesia, including general sedation. For those that are not aware of the levels of anesthesia, the level after general sedation tends to be death. So, it's pretty important that we get that regulation right. Obviously, the unlicensed practice of a profession with that scope represents significant risk to the public, and the procedures performed access to powerful substances and access to patients who are in a compromised state. The end result was a recommendation to create the profession, which will be a new one for my organization to regulate should it pass the legislature.

The other proposal involved a scope expansion for midwives. This is an existing profession in Washington, but the question was: Did they need to have a scope expansion involving the ability to prescribe certain types of birth control, treatments for STIs, and some common postpartum vaginal conditions. In this instance, the debate centered around what specific substances would be prescribed and what could the potential negative outcomes be. The other question was how much and what kind of training would be appropriate. These tend to be more difficult conversations with plenty of discussion between professions about clinical specifics—hardly something suited for a one-hour legislative hearing. In the end, all parties agreed with the concept but asked the midwifery profession to come back with more specifics on what they wanted to prescribe and add more definition to the proposal.

In the broadest sense, both proposals were attempting to address access to care issues in different sectors of healthcare. They will both likely become law in 2022, as a Sunrise Process helped us answer that there was indeed a problem requiring a regulatory approach that could not be addressed under current statute.

Line: Those are great examples. Thanks, Micah. So I guess the next thing that legislators can then ask is: What previous efforts have been made to address this problem? Have alternatives to the regulation of individuals been considered? What are some of those alternatives? So Ronne, let's talk about why legislators should consider that.

Ronne Hines: Sure, thanks, Line. I think there have been a variety of approaches to address the problem. Some of the alternatives to regulation we've already heard today, but in asking the question, legislators really can see that there are multiple alternative approaches taken to regulation. All of them, as Micah pointed out, can be influenced by various stakeholders, by the professions, by the regulators themselves, as well as legislators. So it's interesting to see when we look, what efforts have been successful and which ones really best strike the right balance. It's this balance that I think should be the focus for legislators. If they're really going to consider regulation, they should consider asking questions and looking back on what these approaches might look like in protecting the public and whether regulation is really needed.

We see many professions, ranging from social workers to nursing, that developed a code of ethics. For some professions, this might actually be sufficient to guide the profession while protecting consumers.

Other approaches include just having supervision. Supervision might be sufficient in addressing the potential problem. For example, in some states like Colorado, veterinary techs aren't registered or certified, but rather they work under the license of the veterinarian, and it's the supervision by the veterinarian while they provide services that allows for consumer protection. It's a great alternative for some occupations and really does allow to protect the public without the need for formal regulation.

Some occupations or professions may not need regulation at all, while consumers would still have an opportunity to address a concern or issue. This could happen by filing a complaint with the Court, for example.

Another example of this, which I think is a little bit unique in Colorado, we have the Colorado Consumer Protection Act, which outlines one example as complementary and alternative health care practitioners. So in recognizing the importance for individuals to choose their health care provider, Colorado has chosen to highlight this in the Consumer Protection Act, noting specifically that these professions do not need to be licensed or certified and that there is not an imminent or discernible risk of significant harm to the public or health. So it's really just putting them on notice that they do have a scope of practice without being regulated.

And then, of course, we do move to the different levels of regulation. We've seen efforts range from title protection, obviously one of the lowest levels of regulation that wouldn't require registration but allows practitioners to use a title that they're qualified.

We also see certification, which does offer a level of consumer protection, but with lower barriers to entry, often maybe like a vocational educational program.

We've also seen registration programs serve to protect the public that could be ensuring an individual satisfies some requirements. Often we might see these [requirements] to include insurance or a disclosure form, and then they would be placed on a registry. For Colorado, we actually often regulate businesses in this way, including pharmacies or salons.

And then, finally, of course, there's licensure where we see educational licensing exams as a barrier to entry, but it really does ensure competency for the public.

These efforts are all alternatives that a legislature could consider, and we've seen them range across multiple professions, with different benefits and multiple considerations. So, it really is important to consider and ask questions. I know that's a lot of information, but it really helps show how important it is to strike the right balance when considering regulatory models.

Line: Absolutely, I know that was very thorough, and I appreciate that. I think maybe for today, our last point is the concept of the Sunrise Review. I know Micah touched on it very briefly just a moment ago, but I mean, maybe both of you would be a great person to talk to you on that. So, can you explain

what that is again and how it can be helpful? And Ronne if you also speak to that as well first, and then we'll come back to Micah.

Ronne: Sure, I'd be happy to. So for sunrise reviews in Colorado, our general assembly has determined that's the best way to decide whether regulation of a profession or occupation is necessary before enacting such a law. So it really is the idea that we're going to approach legislation only if we're going to think about the least restrictive regulatory model that would be consistent with public interest. So it is often cited as a best practice.

For Colorado, our law directs the Department of Regulatory Agencies to conduct this analysis, and it really is looking at four factors: harm to the public from an unregulated profession, public benefit from assurance of professional competence, can the public be protected by other means, as well as criminal disqualifications that serve the public interest. And so, to have this review conducted, an interested stakeholder has to file the application, and then our office of policy reviews that to make a recommendation to the legislature, whether regulation would be appropriate or not. But I'm sure Micah has more to add from their process.

Micah: Those are good points, Ronne. So yeah, in Washington, it is much the same, and in my earlier discussion about anesthesiologist assistants and midwives, I touched on the point of difficulty in getting to the pure facts during a legislative session when it comes to scope expansions and creating new professions.

Quite often, there are issues of competition between professionals that blur the lines in these discussions. The Sunrise Review allows the process to slow down, take it further from the heat of the political scene and truly focus on the verifiable facts and impact to patients.

Specifically, the risk, the need for access, and the cost-benefit to the patient; when we are able to bring those issues in a measured way to the forefront, we truly are doing our best work for the patient and the professions.

Line: Well, thank you. So I think this really has been a good foundation for regulatory understanding as we start this series, *Questions a Legislator Should Ask*. Can we finish up this podcast episode today with maybe a summary of the key points for us to consider? So let's circle back to Kara on that.

Kara: Thank you. In summary, there are five key points that should be remembered.

Licensing best practices should apply the results of comprehensive cost-benefit assessments of licensing to reduce the number of unnecessary or overly restrictive requirements.

Licensing best practices should also obtain public input, as professions and occupations may be urging regulation for their own purposes, such as enhancing their reputation, achieving more prestige, or even restricting who can perform their duties, even if others are equally qualified. Rarely do the

professions themselves use the concept of public protection as the need for them to be regulated.

Third, best practices should recognize that not all occupations and professions should be viewed in the same way. What might be included in the regulation for one profession, such as academic degree, hours of training, apprenticeship, may not be the same for another profession or occupation. Additionally, subgroups within a profession, such as nurses, registered nurses, nurse practitioners, practical nurses, may not need to adhere to the same pre-licensure requirements.

Some regulations may include registration or certification of the profession rather than the more stringent licensure. Best practices should include that not all occupations and professions need stringent regulation by the state. Perhaps the regulation might simply state that an individual must be in good standing with its relevant certification agency.

Finally, remember to limit new licensing laws only to those professions and occupations in which there is a legitimate public health, safety, and welfare concern. Licensing requirements should not be designed to place unnecessary burdens on the individuals impacted by the law, nor should the public be required to pay more for a service than is necessary for its protection of health, safety, and welfare.

The bottom line is at no time should regulation for the purpose of public protection be viewed as a myth rather than a reality.

Line: That's excellent. Well, I think this has been a great conversation, so we want to thank you, Sara, Micah, Kara, Ronne, and Alice for speaking with us today.

Kara: It's been great being here.

Micah: Thank you, Line.

Sara: Thanks, Line.

Alice: Thanks, Line.

Line: Absolutely. Well, it's certainly been my pleasure. So, I did also want to thank our regular listeners for tuning in to this episode, as well as all the state legislators and legislative staff for joining us. I think this is hopefully very helpful for you as well.

We also want to invite you to the upcoming webinar series. On November 18, that webinar will focus on "Choosing the Right Tool for the Job: When You Have a Hammer, All You See Are Nails." And the December 8 webinar, which is themed "Be Careful What You Wish For: Engaging the Executive Branch, Stakeholders, and Public in Implementation and Beyond." More information is available on [CLEAR's website](#).

And we'll be back with another episode of Regulation Matters: a CLEAR conversation very soon. If you're new to this CLEAR podcast, please subscribe to us. You can find us on Podbean as well as any of your favorite podcast services.

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Finally, I'd also like to thank our CLEAR staff, specifically Stephanie Thompson. She's our content coordinator and editor for this program. Once again, I'm Line Dempsey, and I hope to be speaking again to you very soon.

The audio version of this podcast episode is available at https://podcast.clearhq.org/e/questions_legislator_ask.