



**Regulation Matters:
a CLEAR conversation**

Episode 54: Sunrise Review and Right-sizing Occupational Regulation June 14, 2022

Line Dempsey: Welcome back to our podcast, Regulation Matters: a CLEAR conversation. Once again, 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 CLEAR's president-elect.

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.

Today's topic is sunrise reviews and right sizing occupation regulation. In more than a dozen states, regulatory agencies regularly conduct what is known as sunrise reviews - basically studies examining whether proposed occupational licenses and other regulations are a good idea.

A new report examines 30 years worth of sunrise reviews and draws lessons for licensing policy. Joining us today are two of the reports co-authors, Lisa Knepper and Kathy Sanchez of Institute for Justice, and CLEAR member Elizabeth Carter, who conducted sunrise reviews for the Virginia Board of Health Professions. We're glad to have you all with us today welcome.

Elizabeth Carter: Happy to be here.

Lisa Knepper: Likewise, thank you.

Line: And we're glad to speak with you, and also let me thank our listeners for joining us today. Around a dozen states have sunrise laws and active programs. So what do they look like and what are their common features? So Lisa, let me address that with you, if you would.

Lisa: Absolutely! So sunrise started back in the 1970s and, at the time, policy makers were concerned about over regulation of occupations and restricting entry into honest work. But of course, it's also important to maintain reasonable regulations that protect public health and safety. And there was an

awareness that a lot of these regulations were being backed by members of the occupation themselves. And so, part of the question here was, how can we study this and how can we step back and examine when a license or another occupational regulation is really a good idea and genuinely in the public's interest, not just the occupation's interest?

And I think the commonalities that our research identified among sunrise programs across states helps illustrate those animating purposes from all the way back in the 1970s, and there's four that I'll note. One is that most sunrise programs asked regulation proponents to offer some justification for the regulation. They might do this through an application process or through a questionnaire process or a public hearing or what have you. But the idea is to say, "Hey, what evidence do you have that there's a real threat to public health and safety that would justify some type of intervention on the part of the government?"

Secondly, these programs typically charge reviewers, the people who write the studies and write the report, with searching for evidence of harm. So, it's not just anecdotes and it's not hypothetical, but some type of concrete facts-based evidence that again would justify some type of intervention.

Third, reviewers are typically asked to weigh costs and benefits, to say what might the downsides of regulation be, what would the upsides be and how did these come out in the wash.

But the fourth thing that I'll point to, I think, is one of the things that really makes sunrise a fascinating policy when it comes to occupational regulation, and that's the idea of least restrictive regulation. So, it's one thing to say that there are risks from an occupation, that they were a threat to public health and safety, and that they're based in fact and grounded in evidence. But it's another to say, "What is the right solution?" Is it licensing, or is it something less restrictive like certification or registration or business regulation?

And that's where the concept of right-sizing regulation comes in. And that's how we make sure that we preserve open entry while protecting public health and safety and preserving, frankly, the resources and time and energy of regulators to make sure that they're focusing their efforts properly on well thought-out policies. And so that's kind of an overview of some of the key and most important commonalities of a sunrise review.

Line: Thank you for that. Yeah I mean, I think, using the proverbial if you would, buckets when you're looking at rules and be able to drop them in each of the different buckets to kind of get a feel for how they apply to regulation now, which is great, and I wish more states would probably do that.

So Kathy, now I understand the IJ's new report gathered analyzed nearly 500 sunrise reviews. So what did you find, and what implications does your research hold for occupational licensing policy?

Kathy Sanchez: Right, so the 30,000 foot view shows evidence of an over licensing problem and evidence that sunrise processes, when done well, can help mitigate that problem. So, sunrise can help

slow the growth of licensing.

And breaking that down, we found that reviewers, who are the government agencies themselves, overwhelmingly recommend against licensing. So this is either usually is recommending no new regulation, but sometimes it's kind of what Lisa said, which is recommending a less restrictive regulation. So this is like government certification, registration, or a business regulation of some sort.

And what this tells us is that most licenses being proposed don't actually stand up to the scrutiny of sunrise. So they aren't actually necessary to alleviate the public's health and safety, and they don't meet that objective sunrise criteria, either because there's no evidence of harm by members of the occupation or the costs will somehow outweigh the benefits.

And we also found that the legislatures do typically listen to this advice. So they do heed reviewers' warnings against licensing. But they still enact licensing more often than sunrise reviewers recommended. So what this tells us overall is that sunrise is not a magic solution to the over licensing problem; rather it's a counterbalance to the industry groups who are typically the ones to request regulation.

Line: Thank you for that. Now I know Virginia has a long history of conducting sunrise reviews. Liz, I want to take a moment to congratulate you on your very recent retirement after 31 years with Virginia's regulatory boards; I know they will certainly miss you. But with that experience as a regulator, can you walk us through the process and give us an example of sunrise reviews that you've been involved with? That would be great.

Elizabeth: Sure, absolutely! I will say first of all, I think it's brought out in your report and it's important for the listeners to understand that the legislature is the only and final arbiter of whether a profession or occupation should be regulated, the degree of that regulation, and even the body and the organizational structure where regulation would take place. So just to be fair to everyone - to the reviewers and to everybody else. And also just so that everybody understands too - in Virginia, not all health professions are regulated, and not all of them that are regulated are regulated in my department, but we get a bunch of them; let's put it that way.

The role of our Board of Health Professions, which is comprised of members from each of the licensing boards and five citizen members, is purely advisory. So we can't make anybody do anything. They've been in existence since the late 1970s, as Lisa was bringing forth, and their role is to do sunrise reviews. They also do other things, but back in the 1980s actually, they established some of the criteria that I'm going to talk about here in just a little bit.

And in 1991 they actually created a document that's been updated in 2019. It's our "Policies and Procedures for the Evaluation of the Need to Regulate Health Professions and Occupations." Long title, but it is our Bible; it really is. It documents the board's authority to do the sunrise reviews. It details the particulars of policies and procedures that each one of these things has to follow and that the

studies are governed by seven criteria.

These criteria really are rooted in our Constitution (it may be different in different states, don't know) and it's not just in our philosophy. You'll see it in our Code of Virginia that licensure or professional regulation would be an occupational property right.

And so we only abridge an individual's right to practice something without a license on to the degree that's necessary, which is what we talked about before—the health, safety and welfare of the public.

And no abridgement can be more than that is necessary to protect or preserve public safety, health, and welfare. Our seven criteria are the risk of harm—the very first one, it must be met before we even do anything else when something comes in. And that's a risk to the consumer — and it has to be attributable to the practice of that particular profession, not just because bad things have happened because people in that profession have done things. It's got to be there because they've done things wrong because they don't know what they're supposed to be doing, their level of competency isn't clear. So that's part of this process.

They also have to show a specialized skills and training. They can't just be, “well anybody says I'm going to be this profession.” What are you; what do you do? So, we really know what that is and so that the members of the General Assembly will also understand what it is these folks are doing.

Autonomous practice is important for us. If you're at a facility, for example, you're overseen by others. There's really no need it, you know. If you're going to hang a shingle out and you'd be out there by yourself and the consumer has to come to you and there's no other oversight, that's another piece of this puzzle that goes into the decisions that they make.

We look at the scopes of practice for that particular profession. You've got to see if it overlaps with other professions. You know, we're not necessarily protecting turf but you also have to make it clear what is it again, what is this profession doing.

We also look at the economic impact, but you mentioned earlier.

Number six is alternatives to regulation. I'm glad Lisa brought this up. There are things you can do; you know, there are injunctions that can be done. There are all sorts of facility inspections and that sort of thing that can happen. And again our very last and final that everything has to be paid attention to—the least restrictive regulation would have to be imposed.

As I mentioned, if criterion one is not met, we're done; we don't do anything further.

Our policies and procedures manual also outlines the levels of regulation that you mentioned earlier: licensure, statutory certification, registration. And we actually have like a cookbook; it refers back to specific criteria. For licensure to be recommended, all seven criteria must be met; and for the others,

there are particular ones, and we tell you how to do that.

In terms of process, we address three questions in this policies and procedures manual: who may request a study and how, how the study's to be conducted, and what happens to the results? So everybody that's in this that made a request will know, the public knows and legislature knows this is the questions that we answer in our studies.

In terms of who may request a study—basically any interested party can do that. Most often, we do receive requests from our General Assembly, either through a legislative resolution or letters from individual members. The governor can do it sometimes. They can, if they want to. Our department director can do that. But the bulk, the far bulk, we have is the professional and occupational regulations or associations.

Sometimes these individuals try to do an Enron and go straight to the legislature, which they can do, they can do, but often what happens is those members of General Assembly kick it back to Board of Health Professions to review this.

When the request comes in, we recommend that someone who is responsible from that group meet with staff, and we kind of go like, “What is it that you're proposing? You know, give us some insight first.”

And then, they have to draft a formal letter and there's a procedure in our manual that says, you know, “We think we're dangerous because. . .”, and you know all these kinds of things sort of tell you what they think their response is to the criteria upfront. That gets placed before the Board of Health Professions itself to decide to ask questions if they need to do that to decide whether to do the study at all. They can say no. We've had them say no before because we've just done one that was very similar, and we said no to that.

But if they decide to go forward, it gets assigned to our regulatory research committee comprised of five members of the general board. And there's a work plan that staff (yours truly and some others, going forward somebody else will be doing that). But again, it's laid out fine, what are we doing, why are we doing this, so you'll have the background, the scope, and the methodology (bringing up that methodology again).

And then you have to address the very specific questions. We really get into the granular details. In the back of our manual, there are a whole host of questions that go into that application when they do it up front to begin with, so they will address generally, what are you, the general questions and then each of the criteria. And then we take that, and we don't trust anything they tell us—you can't do that. Everything we do, we have to independently validate what comes in. It helps us to get some structural, what is this particular profession. But that's what we do.

Our studies always consist of if you can find available literature, review the latest job analyses or role

delineation studies that have been done. That way, you have a sense of what's the knowledge, skills, ability and the individual tasks these people are doing so, if you look at the risk of harm if you do this task wrong because you don't know what you're doing. That's how we get to it. It's not just "Oh, you know, Miss Jones got hurt by Dr Smith. What happened?" We actually will look at where is that risk of harm in what you say you are and how you've defined yourself.

We also look at their education and training requirements, examinations that they may have if they have a national one. We also look at any national or state information, including the laws and regulations that may already exist. We look at the disciplinary history that may be in another state. We look at malpractice information and a whole bunch of other stuff. And I won't take up too much time, but anyway, we'll go into that.

We also determine if there are similar professions, so we make sure that we will also describe them so that the members that are considering whether this is stepping on other people's scope - it can happen as well.

So anyway, we hold public hearings; that is very important. We never have a study where we don't have the public invited to speak, and it can be proponents, opponents, anyone who's interested. And so we also accept written comment. All of that gets condensed into a report that goes back to the regulatory research committee, and the research committee members are there for their hearings as well, so they asked questions.

And then they render a recommendation- yes, no, or we need to have more study- those kinds of things. Whatever recommendation they make, it goes to the full board and then they can discuss it some more, so that if they've got questions, they let us know. If they render a decision that says, "Okay, they need to be regulated," then they have to explain that level anyway, and so forth.

It then goes from our board to our state to our agency's director and then on to our Secretary of Health and Human Resources, or if it's a legislator had made a request the report would go to that individual as well.

It is very important to note, we do not interact with the legislators beyond that; we don't. The board members don't do it; we don't do it. We were looking at this within the context of the study, and basically, our job is to advise. The advice is contained in the report; it stands on its own. So it gets passed on, we put it on our website, and there you go. So we do not make any kind of proposals for regulation. We don't do any of that so anyway, just wanted to make sure you understood that.

In terms of an example, I know I'm running long. None really stand up because they're all treated the same. That's the whole point of this. We try to not, you know; we don't have favorites.

We have had occasions where they've come back multiple times, I will say that. There are two or three different professions that maybe back in the 80s and the Board said no, and then they came back in

the early 90s, and they said no. And then they come back the third time, but what they do is a little bit different.

And then I'll give one example; it is the athletic trainers. Back in the original studies, they were largely working with adult patients. They were working with sports teams and things like that. And Okay, so you know, everybody kind of knew what they were and what they were doing. But what was happening in the later 90s, you have people calling themselves athletic trainers who might be working with children in their little sports teams and things like that. And we had instances in which detached retinas were being missed; we had kids that had a broken bone. You know, we had that kind of evidence that came forward to the board saying, people are calling themselves athletic trainers and they really may just be somebody in the neighborhood that knows how to tape something, and parents think this is an athletic trainer, and they're not.

And so with that level of harm we were dealing with, the board said, "Okay, we at least recommend that if they're going to use this title and they're gonna be working with children, they can't do that." They must be what an athletic trainer had become by that time. We recommended that not all of them had to be licensed. But the General Assembly then took that and said, "no, let's just go ahead and make them all licensed." But it took them three times before they came to us and their world had changed. So anyway, I rambled on a lot, but hopefully I've answered that question for you.

Line: That's good. So Liz, you mentioned legislators, and I think maybe the first thing you mentioned was, "look we don't make the decision; they're the ones that make the decision." Obviously you talked about how they don't necessarily interact with your program. I'm assuming they're not part of the research. But, ultimately, how do they respond to your recommendations? How does that work?

Elizabeth: I would agree with what you see in Lisa and Kathy's report. If we recommend regulation, they tend to do that. If we recommend against it, they tend not to.

So you know and again I'd say really about 80% of the time we say no, and so Virginia's very conservative in terms of the professions that it regulates. So yeah, I think they do pay attention to what we do, particularly those that have been around for a while right.

Yeah, and they know to kick it to us and that's the one thing that's helpful is that they do know. Well, let's let somebody else. It takes the heat off of them as well because, during the public hearings, you might want a state lobbyist to come in and they say their thing, but everybody else does too.

And we don't make that final decision, so it just puts that barrier there. It gives them a little bit of safe space, and then we have objective information; we go, "here." We don't have, as my father used to say, a dog in the fight. We don't, and so, here it is. This is what we came up with, and this is how we did it and why we did it and we do it the same way for everybody. So you're not being picked on, so I think that is helpful.

Line: Great! Well, obviously in your experience (you've been doing this for 31 years) what do you think are the keys to conducting a strong sunrise review?

Elizabeth: Honestly, your consistent procedures. Here's our project manual. This cookbook, if you want to call it that, explains why we do what we do, how we do what we do, and what happens to it. Doing that allows you to have an empirically based rationale for what other recommendations are made and so you'll know exactly why. And so, I think that's it. And it's a transparent process; it's an equitable process.

I know I can't say it in fewer words, but your methodology has to be rigorous, and it has to be transparent and clear and as empirically based as you can make it.

Line: Well, I think you summed it up best by saying, you know, "consistent" and having a cookbook or policies and procedures in place to make sure that that everyone is treated the same. It's brilliant. It's really great to hear from the experience of a regulator. That's fantastic.

So, turning back to the research side of things with Lisa and Kathy. We'll start with you Lisa. What does the research say about how states can set up their sunrise program for success?

Lisa: Absolutely, and I do hope folks will use our report as a resource. We have interviews in there with those who conduct sunrise reviews, including Elizabeth as well as reviewers from Vermont and Colorado. And they provide a lot of very practical inside tips on how to do sunrise well.

But you know, I think that there are three keys that we identified from our research that jive really well with what Elizabeth talked about. One is reviewer independence and having that safe space where reviewers can pay attention to the facts and the evidence, without the political pressures that come from the legislature. And we have seen in a few states where sunrise is embedded within the legislative process it hasn't been very effective, and the reports that have come out of it not been very strong. And so, that reviewer independence and that wall between the political process and the research process is really essential.

A second thing, I believe, is the time and resources to adequately study the problem. Elizabeth talked about verifying every piece of information—that takes time; it takes effort to really do a good job digging into the detail.

And third, the cookbook—having clear, strong criteria and establishing them in statute to the extent possible is, I think, really important to setting a program up for success.

Line: Kathy, anything to add?

Kathy: Yeah, so I'd like to underscore the importance of following these best practices, so whether it's looking at rigorous statutes or building enough time into your review process or really encouraging a

thorough review of evidence of harm.

You know I think you can say for pretty much any policy, yes, you should listen to best practices. But it's especially important, I think, when it comes to sunrise because if you have a sunrise program that isn't well implemented or that conducts very poor reviews, it can actually do more harm than good. And to describe how this would happen is a review that kind of just has a cursory glance over the evidence, the cost, the benefits, and the harm will tend to over recommend licensing. And this can serve as a green light to legislators and say to them, "hey, a thorough review has occurred," when actually it hasn't. So they'll see the sunrise in name only and kind of see it as a green light to regulate. So, you might end up with more licenses with a poor sunrise review process than you would without a sunrise review process at all.

So, this is something, like Lisa said, we've seen in legislative states that have their reviews in legislative committees—in Arizona, for example, we've seen this.

But overall yeah I'd just say to go ahead and review the best practices from other states, including Virginia. But like Lisa says, we do a pretty good job, I'd say, covering this in the report.

Line: Excellent! It certainly sounds like running a robust sunrise program takes time and resources. So, let me pose this question to all three of you. In the end, do the benefits outweigh the program costs?

Elizabeth: Oh absolutely! Our program costs are small. We're an umbrella agency, and so you know we have staff that can conduct research already. We're going to do it for other things anyway, so we're already here.

Also, if we find we need additional help, the agency, actually the board, has funds to pay for a consultant to come in, a graduate student to come in to aid us. But the costs are relatively small, particularly in the age- good Lord, thank goodness for the Internet. I used to have to write letters all the time to all these different places to get it to come in the mail, so now it's much better than it was. But we've always had what we needed commensurate with what we felt was the quality work that we must do.

Lisa: I would underscore that. In the end, this is about providing good information to legislators. It's about providing them solid, impartial evidence and analysis to help them make stronger decisions, even in the face of political pressure. And so, I think that when done well, it is an investment that is well worth it to inform policy making in a really rigorous and evidence backed way.

Kathy: So, I think an investment is the right way to describe this. So, we're not just talking about a wonky policy idea here; we're talking about, at the end of the day, this is something that affects real people. Stopping unnecessary licenses means fewer costs to the state and to taxpayers over time and more people freely working in the occupation of their choice, as well as more options and better-quality services to consumers due to the greater competition.

Line: Well, excellent! I think this has been a great start to the conversation. I want to let listeners know about a follow up webinar that we've got scheduled for this for June 29. Our speakers will be diving deeper into what the research and experience can tell us about establishing a strong sunrise review program. We really look forward to that. Thank you, Lisa, Kathy, and Liz, for speaking with me today.

Kathy: Thank you very much for having us.

Elizabeth: Thank you.

Lisa: Thank you.

Line: Absolutely! It's been a pleasure. And we'd like to continue this conversation on CLEAR communities. This podcast episode will be posted there, and you can reply with your comments. Here's some additional questions to think about and maybe even pose in the Community. How do you think a sunrise program might work in your state? If your state already has one, are there any improvements that you'd like to see happen? Please share your comments on CLEAR Communities.

I also want to thank our listeners for tuning in for this episode. We'll be back with another episode of Regulation Matters: a CLEAR conversation very soon. If you're new to the CLEAR podcast, please subscribe to us. You can find us on Podbean or any of your favorite podcast services.

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Feel free to visit our website at www.clearhq.org for additional resources, as well as the calendar of upcoming online programs and in person events.

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

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