

## The Problem With The Current Regulatory Scheme

Washington law requires licensed professionals who substantially affect the public interest to meet accepted standards. Licensees must conduct themselves honestly and without deception in all matters relating to their profession. Professions and businesses licensed and regulated through the state include health care providers, assisted living facilities, day cares, attorneys, insurance agencies, accountancy, real estate sales, residential loan origination and modification, escrow services, groceries, tow truck companies, car sales, cosmetology, and many more. The legislature established a system of licensure to supplement professional rules of practice, in order to promote honesty and fair dealing and to preserve public confidence.

Health care providers, as well as financial and other professionals licensed to practice their professions and serve their patients and clients, must be regulated by socially accepted standards. The Department of Health, Office of Insurance Commissioner, and Department of Social and Health Services, exist to serve the public mandate: to ensure appropriate health care services to patients by regulating providers effectively. That means reaching out beyond their regulatory or policing role to assist and educate the businesses and professionals that they oversee.

All too often regulatory agencies see their role as a prosecutorial one. They see the justification for their existence as being one of obtaining convictions. Such an attitude often ignores the absence of consumer harm and the irreparable damage caused to the business they “punish.” Technical violations are often met with large fines and prohibitions. For example:

- An escrow service provider intended to do everything right and to the letter of the law. For eight years his was a model business. The business had never had a negative finding against them. Then, he decided to have some minor administrative functions provided at a satellite office. He did not believe that he was violating the law. The Department of Financial Institutions conducted a routine audit and the business owner explained the functions of the branch office. DFI felt that represented an unlicensed office. Rather than ask the business owner to license the business or shut it down, they filed a statement of charges asking for \$50,000 in fines. That fine was in no way connected with any consumer harm – there was no allegation of any. It was simply imposed because, in the words of the Department, because he could afford it. Further, the Department insisted on a 90 day suspension of services. That meant that the business had to shut down and lay off all of its employees. Clearly, public policy was not furthered by this agency action.
- A real estate agency had operated for close to twenty years. There was no history of prior discipline. The Department of Licensing felt that they had not done their due diligence in contacting potential buyers in one transaction. The Department did not allege that the agency profited in any way by this mistake. They attempted to shut the agency down for a year, throwing all the employees out of work.
- A company conducted residential loan modification services. They hired an attorney to represent the clients with the lenders. They believed that they were following the letter of the law, as did the attorney they employed. The regulatory authority came to the conclusion that the relationship between the attorney and the company that employed him was not structured correctly. Instead of advising the business to correct the problem, they shut it down and have

tried to impose tens of thousands of dollars in fines. There was no suggestion of consumer harm. Dozens of employees lost their jobs.

- A medical clinic needed a temporary physician to fill in after their prior doctor left. There were hundreds of patients who needed assistance. They found a doctor in Phoenix, Arizona who was willing to fill in on a temporary basis. He obtained his Washington medical license. He had a DEA license for Arizona – he was told he could use that on a temporary basis in Washington. The doctor came up and assisted the patients, only to find that he in fact needed a Washington DEA number. Instead of allowing the doctor to correct something that was a minor administrative task, the U.S. Attorney’s Office has sued him, leading to the closing of the clinic and the loss of jobs.
- A local grocery serving the Somali community was overpaid in the WIC program. There was no suggestion of fraud. The grocery was willing to pay the money back. The regulatory agency would not stop at that and has put them out of business. The local Somali community now has to travel to obtain the specialty foods their diet requires.

The common theme: state agencies act like police instead of regulators. Some agencies use tax dollars to punitively enforce licensure requirements rather than to educate licensees currently serving patients and clients. Their “success” rate in charging licensees with unprofessional conduct is reflected in the loss of jobs, destroyed professions, and disrupted families lives that result. Absent obvious public harm, state regulatory agencies should not focus on issuing charges and demanding fines, but rather monitor and interact collaboratively to ensure the public good.

The current system emphasizes enforcement, to the detriment of overall quality of care and service, and at our own professional risk. To serve the public good by promoting the integrity of the professions for all licensees, we must change the way in which we oversee ourselves. This is a call for an administrative judiciary, not beholden to any agency.

The current system has to be fixed in order to offer justice to working professionals throughout the state and to improve the health, welfare and safety of consumers in this State. The following specific changes should be implemented:

1. An independent judiciary. Currently, a number of regulatory agencies employ their own administrative law judges. Often those judges are also former employees of the same Departments they now are supposed to provide impartial review of.
2. A well-funded and competent judiciary. Administrative hearings serve to deprive citizens of their property interests in their licenses and their livelihoods. The U.S. Constitution demands that a person has a right to an Article III judge before they are deprived of their lives, liberty, or property. With that comes an higher standards and greater resources. The bar simply needs to be set higher.
3. Regulatory departments should exist to assist professionals and businesses to come into compliance rather than simply prosecute transgressors. Departments should allow their licensees a “second chance” when violations occur that do not cause actual harm to the public. Departments should seek to educate and assist those whom they regulate. If they did this, their licensees might see them as a resource to seek the advice of rather than live in fear of and hide from. The public would be better protected by such an approach.
4. The legislature should make and interpret the rules. Departments currently make the rules that

they enforce and also are entitled legal deference in their interpretation of those rules. A system where the professional police get to write the rules and determine what they mean is subject to abuse. Department interpretations should also be limited to interpretive statements that have to be approved by the legislature.

5. The Attorney General's Office should seek the truth. Once a person asks for an administrative hearing, an assistant Attorney General is assigned to the case. The Attorney General's Office takes the approach that they are there to represent the Department and due its bidding. They seek to win at all costs. However, the AG's Office must take an independent stand and encourage reason when the Department is blind to its own excesses.
6. Judges should be willing and able to impose sanctions upon the Attorney General's Office for abuses during the administrative review process. Currently, Assistant Attorney Generals engage in conduct that serves to deprive licensees of their rights without any fear of being sanctioned financially or otherwise. Discovery abuse and frivolous filings go unsanctioned. This must change so that a licensee gets a meaningful day in court.
7. Incompetent judges must be removed. There must be a professional review process that is empowered to review incompetent administrative law judges.
8. There should be an ombudsman for each department. That position would be able to receive and investigate complaints regarding the departments to which they were assigned. Further, they would help problem solve and mediate disputes.

These and other stories have a common theme. Well-meaning business men and professionals attempt to navigate a very complex regulatory landscape. Instead of assisting these businesses to get into compliance, regulatory agencies often simply punish them without thought of the loss of jobs and destroyed lives that result from that approach. Absent meaningful consumer harm, businesses should be given a chance to come into compliance before being shut down. And regulatory agencies should adopt a role of partnering with the businesses they regulate to get them there.